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In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor
KAREN I. WARD
Associate Solicitor
CHARLES I. HADDEN
Counsel for Appellate Litigation
STEVEN J. MANDEL
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the subpoena provisions of the Fair Labor Standards Act, 29 U.S.C. 209 and 211, which authorize the Secretary of Labor to compel the production of documentary evidence without a warrant, violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

The Secretary of Labor and Al Godes and Loren Gilbert, two officers of the Department of Labor, were named as defendants in the district court and are appellants here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	4
The question is substantial	8
Conclusion	16
Appendix A	1a
Appendix B	9a
Appendix C	11a
Appendix D	13a
Appendix E	15a

TABLE OF AUTHORITIES

Cases:

California v. *Grace Brethren Church*, No. 81-31 (June 18, 1982)	7, 8
Donovan v. *Dewey*, 452 U.S. 594	13
Donovan v. *Mehlenbacher*, 652 F.2d 228	13, 15
FTC v. *Crafts*, 355 U.S. 9	16
Grand Jury Proceedings, In re, 601 F.2d 162	13-14
Inland Steel Co., In re, 492 F. Supp. 1310	14
Kulp Foundry, Inc., In re, 691 F.2d 1125	14
Marshall v. *American Olean Tile Co.*, 489 F. Supp. 32, aff'd, 636 F.2d 1209	14
Marshall v. *Barlow's, Inc.*, 436 U.S. 307	6, 7, 12, 13, 14
Marshall v. *Walbridge*, 84 Lab. Cas. (CCH) ¶ 33,723	14
McLucas v. *DeChamplain*, 421 U.S. 21	8

Cases—Continued: Page

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 ..... 10-11, 12

See v. *City of Seattle*, 387 U.S. 541 .... 11, 12, 13

Shapiro v. *United States*, 335 U.S. 1 15

United States v. *Clark*, 445 U.S. 23 7

United States v. *Miller*, 425 U.S. 435 .. 11, 12, 15

United States v. *Morton Salt Co.*, 338 U.S. 632 11

United States v. *Powell*, 379 U.S. 48 11

Zurcher v. *Stanford Daily*, 436 U.S. 547 .. 14

Constitution, statutes and regulations:

U.S. Const.:

Amend. IV 2, 6, 10, 11, 12, 13, 14, 15

Warrant Clause 10

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1134(c) 9

Department of Energy Act of 1978, 42 U.S.C. (Supp. IV) 7255 9

Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*:

Section 9, 29 U.S.C. 209 ..... 2, 4, 7, 8

Section 11, 29 U.S.C. 211 ..... 4, 7, 8

Section 11(a), 29 U.S.C. 211(a) 2

Section 11(c), 29 U.S.C. 211(c) 6

Federal Alcohol Administration Act, 27 U.S.C. 202(c) 9

Federal Communications Act, 47 U.S.C. 409(e) 9

Federal Meat Inspection Act, 21 U.S.C. 677 9

Constitution, statutes and regulations—
Continued: Page

Federal Mine Safety and Health Act, 30 U.S.C. 813(d) 9
Federal Trade Commission Act of 1914 15 U.S.C. (& Supp. V) 41 *et seq.*:
Section 9, 15 U.S.C. 49 ..... 3, 4, 7, 8
Section 10, 15 U.S.C. 50 4
Internal Revenue Code, 26 U.S.C. 7602 9
Interstate Commerce Act, 49 U.S.C. (Supp. IV) 10321(c) 9
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 521(b) 9
National Labor Relations Act, 29 U.S.C. 161 9
National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1401(c) 9
Occupational Safety and Health Act of 1970:
29 U.S.C. 657(a) 7, 12
29 U.S.C. 657(b) 9
Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. at 743 4
28 U.S.C. 1252 8
29 C.F.R. 516.2(a) 6
29 C.F.R. 516.5(c) 6

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (App. D, *infra*, 14a-15a) is not reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 9a-10a) was entered on October 28, 1982. A motion to alter or amend the judgment was denied on November 24, 1982 (App. D, *infra*, 13a-14a). The notices of appeal to this Court were filed on December 15, 1982 (App. C, *infra*, 11a-12a). On February 4, 1983, Justice Blackmun extended the time within which to docket the appeal to and including April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See page 7 note 4, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 9 of the Fair Labor Standards Act of 1938, 29 U.S.C. 209, provides:

> For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance

of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees.

Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such

order of the court may be punished by such court as a contempt thereof.

STATEMENT

1. On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned appellee, a motel-restaurant located in Steele, North Dakota, and informed its manager, Susanne White, that he would commence an investigation of the establishment the following morning. He requested White to have available for inspection time, wage, and payroll records for all employees for the past two years (App. A, *infra*, 2a). The investigation was to be conducted pursuant to Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 211, and its purpose was to determine whether appellee was in compliance with the FLSA.[1]

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[1] Section 11 of the FLSA authorizes the Secretary of Labor to conduct investigations to determine whether any provision of the Act has been violated. Specifically, he is authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate." These investigatory powers are augmented by Section 9 of the FLSA, 29 U.S.C. 209, which, by incorporating by reference Sections 9 and 10 of the Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 49 and 50, authorizes the Secretary "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." In the event of refusal to comply with a subpoena, the Secretary "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." Failure to obey any order of the court to produce documentary evidence "may be punished by such court as a contempt thereof." (Under Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. at 743, all functions of all other officers of the Department of La-

After the investigation was rescheduled at the request of appellee, its attorney sent a letter to Godes inquiring about the scope of and reason for the investigation (App. A, *infra*, 3a). The Department of Labor, represented by Loren Gilbert, Assistant Regional Administrator for the Wage and Hour Division, replied by letter on January 20, 1982, outlining the general scope of an FLSA investigation, but refusing to give the motive for the investigation of appellee because the Secretary's investigatory powers under the FLSA do not depend upon the filing of a complaint (*id.* at 3a-4a). Gilbert also asked appellee to inform him if it intended to withhold consent for the rescheduled investigation, "so that I can request an administrative subpoena in order to conduct the investigation" (*id.* at 4a). Shortly thereafter, appellee's attorney informed Gilbert that appellee would not permit the investigation without a search warrant from an independent magistrate (*ibid.*).

Under instructions to attempt the investigation of appellee and, if permission was refused, to serve an administrative subpoena duces tecum, Godes entered the public lobby area of appellee's premises on February 2, 1982. When the manager did not appear, he served the subpoena on an employee of appellee (App. A, *infra*, 4a).[2] The subpoena, signed by the Administrator of the Wage-Hour Division, requested that an officer, agent, or employee having custody and personal knowledge of appellee's records appear to testify regarding appellee's wage practices and to produce certain records at the Wage-Hour office in Bismarck, North Dakota, on February 9, 1982. The request was specifically limited to certain records required by law to be kept by employers, namely, payroll data and sales records relevant to

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bor are transferred to the Secretary of Labor, although the Secretary is free to delegate those functions to other officers.)

[2] It is uncontested that appellee was properly served with the subpoena (App. A, *infra*, 4a).

whether the company was covered by the FLSA (*id.* at 5a; Stipulation of Facts No. 11).[3] Appellee's attorney subsequently informed the Department of Labor that appellee would not comply with the administrative subpoena on the ground that it was invalid under *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (App. A, *infra*, 5a).

2. Appellee challenged the validity of the subpoena by commencing this action against appellants, the Secretary of Labor, Godes, and Gilbert, in the United States District Court for the District of North Dakota. In its amended complaint, appellee sought to enjoin appellants from "entering [its] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant." Second Verified Complaint at 4. Appellee's complaint also sought a declaratory judgment that the FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative [s]ubpoena after entry to inspect has been denied." *Id.* at 5. On March 3, 1982, the Secretary petitioned the district court to compel appellee to comply with the administrative subpoena. The district court consolidated appellee's injunctive and declaratory judgment action with the Secretary's enforcement action.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellee in each case, holding that enforcement of the subpoena would violate the Fourth Amendment (App. A, *infra*, 1a-8a). The court first expressly found that "[t]he actions of the Secretary * * * unquestionably comport" with the provisions of the FLSA setting forth his investigative powers (*id.* at 6a). Hence, the

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[3] Regulations implementing 29 U.S.C. 211(c) require employers to keep the type of information requested. See 29 C.F.R. 516.2(a) (payroll information) and 516.5(c) (sales and purchase records).

court stated, the controlling issue was appellee's contention that "this statutory scheme is constitutionally impermissible," a contention based exclusively on *Marshall* v. *Barlow's, Inc.*, *supra* (App. A, *infra*, 6a).

The district court held that this Court's decision in *Barlow's*, which required a warrant based on probable cause prior to non-consensual searches of work areas under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), applies to FLSA investigations (App. A, *infra*, 7a-8a). Indeed, because there is a more compelling basis for proceeding with a warrantless safety and health inspection than one directed at compliance with wage and hour regulations, the court remarked that the reasoning of *Barlow's* "applies with equal—if not greater—force in the instant situation" (*id.* at 8a). Accordingly, the court concluded that "the Secretary * * * may *not* proceed to enter upon the premises of [appellee] for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant" (*ibid.*; emphasis in original). In effect, the court held unconstitutional Sections 9 and 11 of the FLSA, 29 U.S.C. 209 and 211, which, by reference to 15 U.S.C. 49, give the Secretary administrative subpoena power to inspect relevant documents without resort to a warrant.[4]

[4] Although the order and judgment of the district court do not expressly declare the FLSA unconstitutional, they clearly represent a holding of unconstitutionality. The court explicitly found that the subpoena was authorized by statute and that the question therefore was whether its enforcement was "constitutionally impermissible" (App. A, *infra*, 6a). There is no suggestion that the particular subpoena involved here was in any way invalid; hence, a determination of unconstitutionality "'was a necessary predicate to the relief that the lower court granted.'" *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980) (footnote omitted). The effect of the decision is to make officers of the United States "bound by a holding of uncon-

Because the language of the district court's order barred the Secretary from "enter[ing] upon [appellee's] premises" to inspect the records, the Secretary filed a motion to alter or amend the judgment (App. E, *infra*, 15a-17a) by ordering appellee to comply with the subpoena by producing the records at the place named therein—a location away from appellee's premises. The court denied the motion (App. D, *infra*, 13a-14a).

THE QUESTION IS SUBSTANTIAL

1. The decision of the district court holds unconstitutional the power conferred upon the Secretary of Labor by Sections 9 and 11 of the Fair Labor Standards Act of 1938 to compel by subpoena the production of relevant documents in connection with an FLSA investigation. At a minimum, the decision seriously interferes with the longstanding mechanism established by Congress to enforce important federal legislation designed to assure fair minimum labor standards. Requiring a warrant based on probable cause as a precondition to government inspection of payroll and wage records of an employer will severely impair the Secretary's ability to monitor compliance with the FLSA.

Moreover, the ramifications of the district court's decision, if it is permitted to stand, range far beyond the specific context of enforcement of fair labor standards. The subpoena provision of the FLSA simply incorporates by reference the subpoena provision of the Federal Trade Commission Act of 1914, 15 U.S.C. 49. Thus, as a practical matter, the decision below also invalidates the subpoena power of the FTC, as well as the subpoena powers of other governmental bodies who de-

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stitutionality" (*California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975)), and thus there is no doubt that direct appeal of the decision to this Court lies under 28 U.S.C. 1252.

rive their authority by reference to the FTC Act. See, *e.g.*, 42 U.S.C. (Supp. IV) 7255 (Department of Energy Act of 1978); 29 U.S.C. 1134(c) (Employee Retirement Income Security Act of 1974); 29 U.S.C. 521(b) (Labor-Management Reporting and Disclosure Act of 1959); 27 U.S.C. 202(c) (Federal Alcohol Administration Act); 21 U.S.C. 677 (Federal Meat Inspection Act).[5]

In sum, the district court's decision calls into question the constitutionality of the subpoena power across a broad spectrum of federal regulatory activity. This Court should grant review to remove the cloud placed on the validity of a long established investigative tool that is essential to enforcement of an array of important federal statutes.

2. Apart from the broad potential impact of the district court's decision, further review is required because the decision is manifestly erroneous. In the name of protecting against unreasonable searches and seizures, the decision strikes down a well established administrative enforcement system. Yet it does not significantly advance any legitimate privacy interest and is completely unsupported by established principles of Fourth Amendment jurisprudence. Indeed, the decision below is flatly inconsistent with a controlling precedent of this Court upholding the subpoena provisions of the FLSA, as well as more than 30 years of consistent decisions by this Court in analogous contexts.

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[5] In addition, the decision of the district court strongly suggests the unconstitutionality of subpoena powers under other statutes that also authorize compelling the production of records without a warrant although they do not expressly incorporate the FTC Act by reference. See, *e.g.*, 49 U.S.C. (Supp. IV) 10321(c) (Interstate Commerce Act); 47 U.S.C. 409(e) (Federal Communications Act); 30 U.S.C. 813(d) (Federal Mine Safety and Health Act); 29 U.S.C. 657(b) (Occupational Safety and Health Act of 1970); 29 U.S.C. (& Supp. V) 161 (National Labor Relations Act); 26 U.S.C. 7602 (Internal Revenue Code); 15 U.S.C. 1401(c) (National Traffic and Motor Vehicle Safety Act).

a. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), this Court rejected the contention that the subpoena power conferred by the FLSA violates the Constitution and, in particular, the Fourth Amendment (*id.* at 195-214). The Court recognized that the statute authorizes the examination of documents without a warrant based on probable cause, but it held that this does not violate the Fourth Amendment's proscription against "unreasonable searches and seizures." The Court stated that the execution of a subpoena for specific documents is not an "actual search and seizure" (*id.* at 195), and ruled that the requirements of the Warrant Clause of the Fourth Amendment do not apply to it. The Court explained that in enforcing a subpoena "[n]o officer or other person [seeks] to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections." *Ibid.* Rather, the Court held, the issuance of a subpoena is a "constructive search" (see generally *id.* at 202-208) that, to the extent the Fourth Amendment applies to it at all, is governed by the constitutional requirement that it not be "unreasonable." *Id.* at 208.

The "reasonableness" of an administrative subpoena, the Court explained, is guaranteed by safeguards different from the warrant based on probable cause required in other contexts to support "actual searches." 327 U.S. at 209. The abuses against which the Fourth Amendment guards in the subpoena context are "too much indefiniteness or breadth in the things required to be 'particularly described'" and whether "the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. Affording the object of a subpoena the right to challenge its validity in court before enforcement protects

against this kind of abuse. *Id* at 209, 217. In the Court's words, protection analogous to the probable cause standard is provided in the subpoena context by "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry * * * [and] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry." *Id.* at 209. Accordingly, the Court held that, in the case of an FLSA administrative subpoena, "[i]t is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 208-209.

Thus, *Oklahoma Press* unequivocally rejects the district court's holding that an FLSA subpoena is unconstitutional unless it is based upon probable cause. The principle of *Oklahoma Press*—that specific, relevant administrative subpoenas satisfy Fourth Amendment standards—has been repeatedly reaffirmed by this Court. See, *e.g.*, *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976); *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950). As the Court stated in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted): "[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

The district court did not suggest that the subpoena here was unduly general or burdensome (and it cannot seriously be contended that it is), and the documents sought plainly are relevant to an investigation author-

ized by the FLSA. See *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 210. Rather, the court's decision rests solely on the proposition that *any* FLSA subpoena is invalid unless it is issued by a neutral magistrate based on probable cause (App. A, *infra*, 8a). Accordingly, the decision below seeks to obliterate "the traditional distinction between a search warrant and a subpoena" (*United States* v. *Miller*, *supra*, 425 U.S. at 446), and cannot be squared with the settled rule of *Oklahoma Press*.

b. The unstated premise of the district court's decision appears to be that *Oklahoma Press* and subsequent cases upholding administrative subpoenas were overruled sub silentio by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). That premise, however, is completely without foundation. *Barlow's* involved considerations quite different from those implicated by administrative subpoenas, and nothing said by the Court there casts any doubt on the validity of *Oklahoma Press*. Indeed, *Barlow's* relied heavily (see 436 U.S. at 312-313) on *See* v. *City of Seattle*, *supra*, which, while establishing an administrative warrant requirement for fire inspections, also confirmed the basic principle of *Oklahoma Press* that the Fourth Amendment constraints on an administrative subpoena duces tecum relate to relevance and burdensomeness, not probable cause. See pages 10-11, *supra*.

In *Barlow's*, this Court held unconstitutional the inspection powers conferred on the Secretary of Labor by the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), to search the work area of any employment facility for safety hazards and violations of OSHA regulations. The opinion in *Barlow's* makes clear, however, that the requirement that these searches be conducted pursuant to a warrant has no application to the "constructive search" involved in the enforcement of an

administrative subpoena. The Court's concern in *Barlow's* was with a broad administrative power to enter and inspect private premises, and the consequent invasion of privacy, that was unrestrained by any prior judicial review. The Court characterized the OSHA statute as "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. Moreover, the Court noted, the statute did not require the inspector to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Ibid.*; footnote omitted. A warrant requirement, the Court concluded, would obviate both of those problems by delimiting the scope of the search and "provid[ing] assurances from a neutral officer" that the proposed search was reasonable and authorized by statute. *Ibid.*; see also *Donovan* v. *Dewey*, 452 U.S. 594, 601 (1981).

These concerns are not implicated in the subpoena context. The FLSA subpoena does not confer unbridled discretion upon the officer in the field. It must be issued by the Wage-Hour Administrator, and, more important, it can be enforced only by resort to a court in which the subpeonaed party may raise objections to its reasonableness. See *See* v. *City of Seattle*, *supra*, 387 U.S. at 544-545. The subpoena is not open-ended like the search in *Barlow's;* it identifies the particular documents to be submitted. See *id.* at 544. And perhaps most important, a subpoena does not authorize or even require an entry onto the employer's non-public premises. Thus, the subpoena procedure itself provides the Fourth Amendment protection that the Court found lacking in *Barlow's* in the absence of a warrant, and, as the lower courts consistently have held, there is nothing in *Barlow's* that undercuts the long established validity of administrative subpoenas. See, *e.g.*, *Donovan* v. *Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981); *In*

re Grand Jury Proceedings, 601 F.2d 162, 168 & n.1 (5th Cir. 1979); *Marshall* v. *American Olean Tile Co.*, 489 F. Supp. 32 (E.D. Pa.), aff'd, 636 F.2d 1209 (3d Cir. 1980); *Marshall* v. *Walbridge*, 84 Lab. Cas. (CCH) ¶ 33,723 (N.D. Ind. 1978).[6]

The district court's decision that a search warrant must be used instead of a subpoena turns accepted Fourth Amendment principles on their head. It is generally recognized that a subpoena duces tecum, which allows the recipient of the subpoena (rather than a law enforcement officer) to search for the relevant documents, is substantially *less* intrusive of privacy interests than a search warrant. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563 (1978); *id.* at 571, 573 (Stewart, J., dissenting). Indeed, despite *Barlow's*, some lower courts have held that, because of the additional safeguards provided by the subpoena process, Congress intended that OSHA inspectors always use a subpoena to inspect documents, and therefore they may not use a warrant for that purpose. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1130-1133 (3d Cir. 1982); *In re Inland Steel Co.*, 492 F. Supp. 1310 (N.D. Ind. 1980). These decisions highlight the error of the district court's invalidation on Fourth Amendment grounds of administrative subpoenas in favor of warrants.

Finally, the contention that the FLSA subpoena issued here violates the Fourth Amendment is made

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[6] The Court's opinion in *Barlow's* did note that its invalidation of OSHA's unrestricted statutory inspection power also applied to an inspection of documents. 436 U.S. at 324 n.22. That comment was made, however, in the context of an entry onto the employer's non-public premises to effect, *inter alia*, a broad inspection of documents in the absence of either a warrant or a subpoena. It certainly does not suggest that a warrant, rather than a subpoena, is necessary for every inspection of documents. Indeed, the Court's primary objection to the document search was the failure to "delineat[e] the scope of [the] search" (*ibid.*), a function that manifestly is performed satisfactorily by a subpoena.

even more untenable by the fact that the records sought are ones that are required by law to be maintained. See note 3, *supra*. Thus, the records have a public aspect that vitiates any claim by appellee of a reasonable expectation of privacy in their contents. See *United States* v. *Miller*, *supra*, 425 U.S. at 440-443; *Shapiro* v. *United States*, 335 U.S. 1, 32-36 (1948); *Donovan* v. *Mehlenbacher*, *supra*, 652 F.2d at 231. If the government is empowered to require employers to maintain certain records to help assure compliance with the FLSA, the government ought to be able to see those records without having to demonstrate probable cause that a statutory violation exists. In sum, the district court's invalidation of FLSA subpoenas on the ground that an inspection of documents is a "search" that may only be made pursuant to a warrant defies common sense and is directly contrary to longstanding precedents of this Court.[7]

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[7] Because the district court's opinion and judgment specifically bar the Secretary of Labor from "enter[ing] upon the premises of appellee" (App. A, *infra*, 8a; App. B, *infra*, 9a-10a), a superficial reading suggests that the court did not necessarily hold that inspection of the documents themselves would violate the Fourth Amendment, but rather held only that a physical entry onto appellee's premises to execute the subpoena would be unconstitutional without a warrant. Upon further examination, however, it is clear that such a reading is erroneous.

First, and foremost, the subpoena at issue specifically requested production of the documents at the local Wage-Hour office (see Stipulation of Facts No. 11), and thus the validity of an entry onto appellee's premises was not even before the court. The papers filed by the parties confirm that the issue litigated in the district court was the warrantless "search" involved in the *inspection* of the documents, rather than an entry that the government did not even seek. The stated basis for appellee's contention that the subpoena violated the Fourth Amendment was the allegation that the subpoena "purports to authorize inspection of [appellee's] records without a warrant or its equivalent * * * [and] probable cause." Second Verified Complaint at

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal. Cf. *FTC* v. *Crafts*, 355 U.S. 9 (1957).

Respectfully submitted.

REX E. LEE
Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor

APRIL 1983

3-4. The government emphasized in its papers that the subpoena did not require entry onto appellee's premises, stating that compliance officers "are instructed not to enter any non-public area of any establishment without the employer's permission" and that, if an employer does not want to have records reviewed on his premises, "compliance officers will agree to any other reasonable arrangements to review the records off the employer's premises." Memorandum in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, at 13. Finally, the fact that the subpoena did not contemplate entry onto appellee's premises was again brought to the district court's attention in the government's Motion to Alter or Amend the Judgment (App. E, *infra*, 15a-17a). The court's denial of that motion (App. D, *infra*, 13a-14a) plainly demonstrates that its decision holds unconstitutional the use of an administrative subpoena to inspect documents even off the employer's premises.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

OCTOBER 28, 1982

A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

ORDER

These cases, which were consolidated for purpose of trial, are now before the Court on cross motions for summary judgment. All operative facts have been stipulated. The central issue, resolution of which is dispositive in both cases, is whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C., § 211) without having obtained a judicially issued warrant.

The facts agreed upon and material to a resolution of the issue stated, are as follows:

1. Section 11 of the Fair Labor Standards Act provides, *inter alia*, that officers of the Wage-Hour Division of the United States Department of Labor may enter upon the premises of certain business establishments and conduct investigations with an eye to compliance with the act and related regulations. In most cases, the compliance officer arranges an appointment with the owner or manager of the business establishment for that purpose.

2. The compliance officer is under instructions to review compliance throughout the particular establishment then being reviewed, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation. In the instant case, the investigation sought to be conducted is unlimited in scope.

3. On January 6, 1982, a compliance officer with the Wage & Hour Division of the Department, Al Godes, whose office is in Bismarck, North Dakota, telephoned Lone Steer, Inc., a motel-restaurant located in Steele, North Dakota, and informed its manager, Susann White, that he would commence an investigation of the establishment the following morning at 9:00 o'clock, A.M. He also told Ms. White to have available time, wage and payroll records for all employees for the last two years. Later that day, Mrs. White called Mr. Godes back and advised him that it was not convenient for Mr. Godes to conduct the investigation the following morning.

4. On January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had rescheduled the investigation of Lone Steer for January 14, 1982, at 9:00 o'clock, A.M.

5. On January 12, 1982, the attorney for Lone Steer, Richard G. Peterson, called Mr. Godes concerning the

investigation of Lone Steer. Mr. Peterson advised Mr. Godes that he might be able to meet with Mr. Godes at Lone Steer, but that he would get back to Mr. Godes to confirm.

6. The same day, January 12, Mr. Peterson set Mr. Godes a letter informing him that:

> I represent Lone Steer Cafe in Steele, North Dakota.
>
> Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).
>
> If, on the other hand, you propose a general administrative inspection for compliance—not prompted by specific complaint—we request to know the scope of the investigation.
>
> Until this matter is resolved, you do not have permission to conduct an investigation.

7. On January 14, Mr. Godes called Lone Steer, but was unable to reach Ms. White. Later that day, after Mr. Godes received the January 12 Peterson letter, Mr. Godes placed two more calls to Lone Steer, but was still unable to reach Ms. White.

8. Mr. Godes forwarded Mr. Peterson's January 12 letter to the Regional Office of the Wage & Hour Division in Denver, Colorado. On January 20, 1982, the Assistant Regional Administrator for the Wage & Hour Division, Loren E. Gilbert, sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will

not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941).

Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.

I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Mr. Godes was instructed to attempt the investigation in the company of Gerald Hill, Assistant Area Director, Denver.

9. Mr. Gilbert's letter was received by Mr. Peterson on January 25. On January 28, Mr. Peterson called Mr. Gilbert to reiterate that Mr. Godes did not have permission to investigate Lone Steer. Mr. Gilbert was also advised that a warrant from an independent magistrate would be required under the ruling of the Supreme Court of the United States in *Marshall* v. *Barlow's, Inc.* Mr. Godes was thereupon directed by Mr. Gilbert to attempt the investigation of Lone Steer and, in the likely event of refusal, to serve Lone Steer with an administrative subpoena duces tecum.

10. On February 2, 1982, at approximately 10:30 a.m., Mr. Godes, accompanied by Mr. Hill, entered the Lone Steer establishment in an attempt to conduct an investigation. After some delay, and in the absence of Ms. White, Mr. Godes served an administrative subpoena duces tecum on a Lone Steer employee, Karen Arnold. The parties are in agreement that Lone Steer, Inc., was properly served with the administrative subpoena duces tecum.

11. The administrative subpoena duces tecum was issued in Washington, D.C., on January 28, 1982, over the signature of William Otter, Administrator of the Wage and Hour Division, and directed to "any officer, agent or employee of Lone Steer, Inc., a corporation, ... having custody, personal knowledge, and information regarding the books, papers and documents described below."

12. On February 8, 1982, Mr. Peterson called Henry Mahlman, Counsel for the United States Department of Labor in Denver, Colorado, to advise that Lone Steer would not acknowledge and comply with the administrative subpoena duces tecum. This position was confirmed in a letter to Mr. Mahlman dated February 10, 1982. This letter stated:

> This letter is pursuant to our telephone conference on February 8, 1982 when I informed you that we view the Administrative Subpoena, attached hereto, issued by the Wage-Hour Administrator, U.S. Department of Labor, as invalid under the Fourth Amendment and the clear holding of Secretary of Labor *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 Sup.Ct. 1816, 56 L.Ed.2d 305 (1978). Accordingly, I further informed you that Lone Steer, Inc. would respectfully decline to respond to it. I also informed you that we are ready to defend against any motion or action the Labor Department deems appropriate to resolve the issue.
>
> The U.S. Supreme Court in *Barlow's* stressed the "presumptive" invalidity of warrantless inspections under regulatory statutes. We believe there is little doubt that a broad discovery device, a Subpoena, issued by the Department itself, cannot be utilized when entry to an employer's premises for purposes of a search and seizure is denied. As you recall, in *Barlow's*, your Department obtained a Court Order, under "compulsory-process" provisions of OSHA, which was held invalid under the Fourth Amendment.

> The issue is so important that we request that this matter be referred as expeditiously as possible to a forum for resolution. Accordingly, I am taking the extraordinary step of sending a copy of this letter to the U.S. District Court.

The actions of the Secretary, as described above, unquestionably comport with the provisions of the Fair Labor Standards Act, as amended, 29 U.S.C., § 201 *et seq.* Section 11(c) of the Act and its implementing regulations (29 C.F.R. 516) specifically authorize the Secretary's representatives to inspect, review and transcribe the records described in the administrative subpoena, and require Lone Steer to make those records available for such purposes. Section 9 of the Act (29 U.S.C., § 209) provides that, for purposes of such compliance investigations, the provisions of Sections 9 and 10 of the Federal Trade Commission Act are made applicable to the investigatory powers of the Secretary of Labor. Section 9 of the Federal Trade Commission Act (15 U.S.C., § 49) in turn establishes the authority "...to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation,..." and for the enforcement of such subpoenas by the courts of the United States. And, Section 10 of the Federal Trade Commission Act (15 U.S.C., § 50) makes refusal to comply with such a subpoena an offense punishable by fine or imprisonment, or both.

Lone Steer asserts that this statutory scheme is constitutionally impermissible, and that the records described in the administrative subpoena issued in this case need not be produced except in response to a warrant issued by a judicial officer upon a showing of probable cause. Lone Steer's exclusive authority for this position is the case of *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307.

The Secretary, on the other hand, contends that *Barlow's* does not erode previously established authority to the contrary and argues that that case has no application to Section 11 of the Fair Labor Standards Act.

A safety and health inspection under the provisions of OSHA (Occupational Safety and Health Act, 29 U.S.C., § 651 *et seq.*) was the object of an attempted warrantless entry upon the premises of Mr. Barlow's electrical and plumbing installation business. Upon the Secretary's petition, a show cause order was issued by the federal district court and, subsequent to a show cause hearing, the Secretary's application for an order compelling entry, inspection and investigation was granted. Mr. Barlow again declined to permit entry and inspection, basing his refusal on the absence of a search warrant. The case squarely presented the issue of whether the entry and inspection provisions of the Occupational Safety and Health Act are consistent and compatible with the prescriptions of the Fourth Amendment. A three-judge district court held that the inspection provisions of OSHA, insofar as they authorize warrantless inspections of those commercial establishments covered by the Act, are unconstitutional and in violation of the Fourth Amendment. See: *Barlow's Inc.* v. *Usery, et al.*, 424 F.Supp. 437 (D.C., D.Id. 1977).

The Supreme Court, in affirming the lower court decision, held that the Fourth Amendment prohibits unconsensual inspections in the work areas of business for the purpose of safeguarding employees against hazards; however, probable cause, in the criminal law sense, is not required as a basis for the issuance of a warrant. *Marshall, et al.* v. *Barlow's, Inc.*, 436 U.S. 307, 320. The probable cause which justifies the issuance of a warrant for the purpose of conducting an administrative search may be based not only on evidence of an existing violation of a statute or regulation, but may also

be found on a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967), quoted with approval in *Barlow's*, *supra*, at page 520.

The Secretary's argument that *Barlow's* does not apply to Section 11 investigations is untenable. It is reasonable to conclude that the exigencies of an entry upon commercial premises for the purpose of conducting a safety and health inspection designed to protect the personal well-being of employees supply more compelling bases for proceeding without a warrant than the circumstances presented here, where entry is sought for the purpose of determining compliance with wage and hour regulations. The reasoning of the Supreme Court in *Barlow's* applies with equal—if not greater—force in the instant situation.

In sum, I hold that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant.

Now Therefore, the Court having considered the cross motions for summary judgment, together with briefs and all other pertinent documents on file herein, and having concluded that there are no material facts at issue in either of the captioned cases, and that Lone Steer, Inc., is entitled to a judgment as a matter of law, it is

ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, in each one and both of the above captioned cases, be entered by the Clerk. No costs to either party.

Bismarck, North Dakota, this 27 day of October, 1982.

/S/ BRUCE M. VAN SICKLE

BRUCE M. VAN SICKLE, *Judge*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA—
SOUTHWESTERN DIVISION

Civil Action File No. A1-82-10

LONE STEER, INC.,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,

JUDGMENT

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

Dated at Bismarck, North Dakota, this 28th day of October, 1982.

CLETUS J. SCHMIDT, *Clerk*
By: DONALD E. EMINETH
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA—
SOUTHWESTERN DIVISION

Civil Action File No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

v.

LONE STEER, INC., A CORPORATION,

JUDGMENT

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

Dated at Bismarck, North Dakota, this 28th day of October, 1982.

CLETUS J. SCHMIDT, *Clerk*
By: DONALD E. EMINETH
Deputy Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR; AND AL GODES, COMPLIANCE OFFICER WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants Raymond J. Donovan, Secretary of Labor, United States Department of Labor, and Loren Gilbert and Al Godes, Department of Labor, hereby appeal to the Supreme Court of the United States from the Judgment entered in the above-entitled action on October 28, 1982. A timely Motion to Alter or Amend was denied by an Order entered on November 24, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

Dated this 15th day of December, 1982.

RODNEY S. WEBB
United States Attorney

/s/ CHARLES S. MILLER, JR.
CHARLES S. MILLER, JR.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Petitioner Raymond J. Donovan, Secretary of Labor, United States Department of Labor, hereby appeals to the Supreme Court of the United States from the Judgment entered in the above-entitled action on October 28, 1982. A timely Motion to Alter or Amend was denied by an Order entered on November 24, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

Dated this 15th day of December, 1982.

RODNEY S. WEBB
United States Attorney

/s/ CHARLES S. MILLER, JR.
CHARLES S. MILLER, JR.
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

ORDER

Under the provisions of Rule 59(e), Federal Rules of Civil Procedure, the Defendant-Respondent above named, Raymond J. Donovan, Secretary of Labor, has moved to alter or amend the order heretofore entered in this case on October 28, 1982 (file document #35). In support of his motion, the Secretary has submitted copies of two unreported cases: *Kulp Foundry, Inc.*, (3rd Cir., Nos. 81-2450 and 81-2451, October 28, 1982), and *U.S.* v. *New Orleans Public Service, Inc.*, (E.D.La., No. 73-1297, September 10, 1982).

In this Court's view, the cases above cited do not give support to the movant's position concerning the the central issue in these lawsuits.

Now Therefore, the Court having considered the pending motion to alter or amend, together with briefs and all other pertinent documents on file herein, and being well and sufficiently advised in all the premises, it is

ORDERED that said motion to alter or amend this Court's order of October 28, 1982, be, and the same hereby is, in all things *denied*.

Bismarck, North Dakota, this 24 day of November, 1982.

/s/ BRUCE M. VAN SICKLE
BRUCE M. VAN SICKLE, *Judge*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No.
A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

Civil Action
No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

MOTION TO ALTER OR AMEND JUDGMENT

This motion is submitted by the Secretary of Labor pursuant to Federal Rules of Civil Procedure 59(e). The judgment in these consolidated cases was entered on October 28, 1982.

The alterations or amendments sought are necessary because the judgment, in its present form, is (1) not dispositive of Civil Action No. A1-82-24 and (2) affords relief not requested by any party and does not address the relief sought by the Secretary.

The Secretary moves to alter or amend the judgment as follows (proposed alterations or amendments are underlined):

"This action came on for hearing before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

It is further Ordered and Adjudged that the Administrative Subpoena Duces Tecum, which requires the production, for inspection and copying by the Secretary of Labor, of records Lone Steer is required to maintain, at a location away from Lone Steer's premises, should be enforced. Lone Steer is directed to comply with the terms of said subpoena by producing such records at the place therein provided, on , 1982 at o'clock m."

The Secretary respectfully submits that legal authority heretofore submitted should be dispositive of this matter and that additional briefing, as provided by Rule 5 of the Rules of this Court, is not necessary.

The Secretary of Labor strongly believes oral argument would be of assistance to the Court, and accordingly respectfully requests permission to be heard on this motion.

Dated 3rd day of November, 1982.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

TEDRICK A. HOUSH, JR.
Regional Solicitor

/s/ HENRY C. MAHLMAN

HENRY C. MAHLMAN
Associate Regional Solicitor

CHARLES S. MILLER
Assistant United States Attorney

Office of the Solicitor
1585 Federal Building
1961 Stout Street
Denver, CO 80294
(303) 837-5521
FTS: 327-5521

P.O. Box 699
Bismarck, ND 58502

Office-Supreme Court, U.S.
FILED
AUG 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JOINT APPENDIX

REX E. LEE
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellants

RICHARD G. PETERSON
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
Counsel for Appellee

JURISDICTIONAL STATEMENT FILED APRIL 14, 1983
PROBABLE JURISDICTION NOTED JUNE 6, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

INDEX*

	Page
Relevant Docket Entries	1
Stipulation	11
Second Verified Complaint for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment	18
January 20, 1983, Letter from Loren E. Gilbert to Richard G. Peterson, Exhibit A	23
Subpoena Duces Tecum, Exhibit B	25
Order Granting Certiorari	27

*The opinion of the District Court, denial of the motion to alter or amend the judgment, and the notices of appeal to this Court appear at pp 1a-17a of the jurisdictional statement and have not been reprinted here.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA

Civ. No. A1-82-10

LONE STEER, INC.

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR;
LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR;
AND AL GODES, COMPLIANCE OFFICER
WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

RELEVANT DOCKET ENTRIES

1982	
Feb. 1	SUMMONS (prepared by counsel) with attached VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT, w/attached Exhibit A, Filed.
	MOTION FOR TEMPORARY RESTRAINING ORDER, w/attached
	AFFIDAVIT OF PLAINTIFF'S ATTORNEY RICHARD G. PETERSON and EXHIBIT A (1-20-82 letter to Richard Peterson from Loren E. Gilbert), Filed.
	PLAINTIFF'S MEMORANDUM BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER, with attached EXHIBITS A-K, Filed.
	ORDER, Filed & Entered, that motion for TRO be denied.
	NOTICE OF ENTRY that atty. Peterson and Al Godes personally received copies of above Order.
	J.S. 5 card made.

Feb. 3	SUMMONS, Issued, (Original and 5 copies to Office of Peterson and Sasseville in Fargo, with Clerk's Order endorsed thereon, appointing Richard Peterson, as person appointed for service of process.)
Feb. 17	SHERIFF's RETURN, Ret'd, Filed, indicating service on AUSA Lynn Crooks, Fargo, on 2-11-82.
Feb. 19	AMENDED VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION PERMANENT INJUNCTION AND DECLARATORY JUDGMENT with Exhibit "A" & "B" with attached AFFIDAVIT OF SERVICE BY MAIL, Filed.
Feb. 22	(ORIGINAL) SUMMONS and AFFIDAVIT OF SERVICE BY MAIL, w/RECEIPTS FOR CERTIFIED MAIL enclosed, Filed. (Loren Gilbert, Al Godes, Raymond Donovan, U.S. Attorney General, U.S. Attorney-Fgo, U.S. Dept. of Labor-Legal Counsel)
Mar. 8	AFFIDAVIT OF SERVICE BY MAIL with CERTIFIED MAIL RECEIPTS, on service of Amended Verified Complaint for Preliminary Injunction, Permanent Injunction and Declaratory Judgment, Filed.
Apr. 12	PLAINTIFF's MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT, Filed. (Proposed Order lodged with the Clerk's Office.)
	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT, Filed.
	CERTIFICATE OF SERVICE, Filed (Documents 10-12 & Second Verified Complaint)
	(Second Verified Complaint for Preliminary Injunction, Permanent Injunction and Declaratory Judgment Lodged with the Clerk pending signing of Order by Court.)
	DEFENDANT's OBJECTION TO MOTION FOR LEAVE TO AMEND COMPLAINT, Filed.
	DEFENDANT's MOTION TO DISMISS, Filed.
	DEFENDANT's MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS, Filed.
	CERTIFICATE OF SERVICE BY MAIL, Filed. (Documents 13-16)
Apr. 14	ORDER, Filed and Entered that Plaintiff's Motion for leave to file a second amended complaint is granted.

NOTICE OF ENTRY to Counsel of Record with copy of Order attached.

SECOND VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION AND DECLARATORY JUDGMENT, with attached Exhibits, Filed.

Apr. 22 PLAINTIFF'S MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS with attached CERTIFICATE OF SERVICE, Filed.

Apr. 22 DEFENDANT'S MOTION TO DISMISS, with SUPPORTING STATEMENT and CERTIFICATE OF SERVICE, thereon, Filed.

Apr. 26 DEFENDANTS' REPLY MEMORANDUM with CERTIFICATE OF SERVICE endorsed thereon, Filed.

May 6 ORDER, Filed and Entered, that motion to dismiss is denied and pre-trial conf. to be held on May 28, 1982 at 9:00 a.m.

NOTICE OF ENTRY to Counsel of Record with copy of Order attached.

May 14 (DEFT'S) *ANSWER* TO SECOND VERIFIED COMPLAINT with attached CERTIFICATE OF SERVICE, Filed.

May 28 PLAINTIFF's PRE-TRIAL BRIEF, with attached CERTIFICATE OF SERVICE, Filed.

PRETRIAL BRIEF FOR THE UNITED STATES DEPARTMENT OF LABOR, with CERTIFICATE OF SERVICE thereon, Filed.

CLERK'S RECORD OF PRE-TRIAL CONFERENCE—Richard G. Peterson for Pltf., Henry C. Mahlman & Charles S. Miller for Defts. Discussion re: Motion & Order to Dismiss & Defts' request for reconsideration thereof. Discussion re: joining this case with A1-82-24. Court request written motion for reconsideration & written motion for summary judgment. Court directs discovery be completed by 7-8-82, and trial, if necessary will be held on 7-9-82. Recess.

ORDER AFTER PRETRIAL, Filed & Entered; cases A1-82-10 & A1-82-24 are consolidated ... counsel are agreed that it may be possible to resolve these cases on cross motions for summary judgment ... the discovery period in both cases is

extended to and including 7/8/82. If fact issues remain for resolution by the Court, the same shall be presented by trial of those issues on 7/9/82 @ 9:30 AM.

June 2 NOTICE OF ENTRY, with copy to counsel. (Copy of Order After Pre-Trial to Court Officials).

July 9 CLERK'S RECORD OF CHAMBERS CONFERENCE—Court Trial scheduled this date—Counsel advise Court that they have agreed to a stipulation of facts and will complete cross-briefing on Motions for Summary Judgment by 8-9-82, at which time Court will consider said motions. Recess.

Aug. 4 STIPULATION of Facts signed by Counsel of Record, Filed. (Conformed copies sent to counsel of record upon request by U.S. Attorney).

Aug. 9 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

CERTIFICATE OF SERVICE BY MAIL, Filed.

MOTION BY RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., FOR SUMMARY JUDGMENT, AND MEMORANDUM OF LAW IN SUPPORT THEREOF, with CERTIFICATE OF SERVICE, thereon, Filed.

Oct. 28 ORDER, Filed & Entered; that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant; . . . the Court having considered the cross motions for summary judgment, . . . and having concluded that there are no material facts at issue, that Lone Steer, Inc., is entitled to a judgment as a matter of law, ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, be entered by the Clerk. No costs to either party. JUDGMENT pursuant to foregoing Order, Filed & Entered; NOTICE OF ENTRY of foregoing Order & Judgment, with copy to counsel.

J.S. 6 card made.

"CLOSED"

Nov. 8 (Deft. Dept. of Labor) MOTION TO ALTER OR AMEND JUDGMENT with CERTIFICATE OF SERVICE BY MAIL, Filed.

Nov. 17 (PLTF) BRIEF IN OPPOSITION TO MOTION TO ALTER OR AMEND JUDGMENT, Filed; with attached CERTIFICATE OF SERVICE (2), Filed.

Nov. 24 ORDER, Filed and Entered, that motion to alter or amend this Crt's Order of October 28, 1982 be, and the same hereby is, in all things, DENIED. NOTICE OF ENTRY with copy attached to counsel of record.

Dec. 15 (DEFT'S) NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES with attached AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO SUPREME COURT OF THE US, Filed. (Conformed copy to AUSA Miller)

1983

Jan. 17 *(GOVT'S) NOTICE OF APPEAL* from Judgment of Oct 28, 1982 to USCA8, Filed. Copy of ADMISSION OF SERVICE FORM. (Form w/Notice of Appeal to counsel for Appellee & Court Reporter)

Copy of ORDER FOR APPELLATE TRANSCRIPT. (Copies to counsel of record & Crt Rep)

Copy of DOCKET ENTRIES as fwd to USCA8 & counsel.

TWO CERTIFIED COPIES OF NOTICE OF APPEAL, JUDGMENT of Oct. 28, 1982 & DOCKET ENTRIES fwd via cert. mail, RRR, to USCA8, St Louis, MO.

ADMISSION OF SERVICE FORM of Notice of Appeal by Court Reporter, Filed.

Jan. 19 ADMISSION OF SERVICE FORM of Notice of Appeal by Appellee, Filed.

Jan 31 (Appellants) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed.

CERTIFICATE OF SERVICE BY MAIL of the foregoing document, Filed.

Feb. 7 (Appellee's) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed, with attached CERTIFICATE OF SERVICE BY MAIL, Filed.

Feb. 17	Copy of INDEX of Designated Record forwarded to USCA8, via cert. mail, RRR.
Apr. 27	NOTICE OF FILING AN APPEAL before the U.S. Supreme Court, Filed.
June 9	Cert. Copy of ORDER of US Supreme Court noting probable jurisdiction, Filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CIV. NO. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

LONE STEER, INC.

RELEVANT DOCKET ENTRIES

1982

Mar. 3	PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached Exhibits A-D, Filed.
	MEMORANDUM IN SUPPORT OF PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached Exhibits, Filed.
	(Proposed Order to Show Cause lodged with the Clerk's Office)
	SUMMONS, Issued, (Original and 1 copy to U.S. Marshal for Service on Susie White, Registered Agent for Lone Steer, Inc.)
	J. S. 5 card made.
Mar. 11	U.S. MARSHAL'S SERVICE RECORD, Returned, Filed, indicating service on Susie White, with ORIGINAL SUMMONS attached.
Mar. 17	COPIES OF DOCUMENT NO. 1 sent to: Denver.
Mar. 25	RESPONDENTS RESPONSE TO PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached CERTIFICATE OF SERVICE, Filed.
May 28	(COPY OF) ORDER AFTER PRETRIAL, Filed & Entered; Cases A1-82-10 & A1-82-24 are consolidated . . . counsel are agreed that it may be possible to resolve these cases on cross motions for sum-

mary judgment ... the discovery period in both cases is extended to and including 7/8/82. If fact issues remain for resolution by the Court, the same shall be presented by trial of those issues on 7/9/82 @ 9:30 AM.

June 2 NOTICE OF ENTRY, with copy to counsel. (Copy of Order After Pretrial to Court Officials).

July 9 CLERK'S RECORD OF CHAMBERS CONFERENCE—Court Trial scheduled this date—Counsel advise Court that they have agreed to a stipulation of facts and will complete cross-briefing on Motions for Summary Judgment by 8-9-82, at which time Court will consider said Motions. Recess.

Aug. 4 STIPULATION of Facts with signatures of Counsel of Record, Filed.

Aug. 9 LONE STEER'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, with attached CERTIFICATE OF SERVICE BY MAIL, Filed.

MOTION BY RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF, with CERTIFICATE OF SERVICE, thereon, Filed.

Oct. 28 ORDER, Filed & Entered; that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant; ... the Court having considered the cross motions for summary judgment, ... and having concluded that there are no material facts at issue, that Lone Steer, Inc., is entitled to a judgment as a matter of law, ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, be entered by the Clerk. No costs to either party.

JUDGMENT pursuant to foregoing Order, Filed & Entered;

	NOTICE OF ENTRY of foregoing Order & Judgment, with copy to counsel.
	J.S. 6 card made.
	"CLOSED"
Nov. 8	(DEFT. DEPT OF LABOR) MOTION TO ALTER OR AMEND JUDGMENT, with CERTIFICATE OF SERVICE, Filed.
Nov. 17	(PLTF) BRIEF IN OPPOSITION TO MOTION TO ALTER OR AMEND JUDGMENT, Filed; with attached CERTIFICATE OF SERVICE (2), Filed.
Nov. 24	Copy of ORDER, Filed and Entered, that motion to alter or amend this Crt's order of October 28, 1982 be, and the same hereby is, in all things, DENIED. (Copy of) NOTICE OF ENTRY with copy attached to counsel of record.
Dec. 15	(DEFT'S) NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES with AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO SUPREME COURT OF THE US, Filed. (Conformed copy to AUSA Miller)
Jan. 17	*(PLTF'S) NOTICE OF APPEAL* from Judgment of Oct. 28, 1982 to USCA8, Filed.
	Copy of ADMISSION OF SERVICE FORM. (Form w/copy of Notice of Appeal to Deft. counsel & Court reporter)
	Copy of ORDER FOR APPELLATE TRANSCRIPT. (Copies to counsel of record & Crt Reporter)
	Copy of DOCKET ENTRIES as forwarded to USCA8 and counsel.
	TWO CERTIFIED COPIES OF NOTICE OF APPEAL, JUDGMENT of Oct 28, 1982 & DOCKET ENTRIES TO USCA8 via cert. mail, RRR.
Jan. 19	ADMISSION OF SERVICE FORM of Notice of Appeal by Appellee, Filed.
Jan. 31	(Appellants) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed. (Copy of) CERTIFICATE OF SERVICE BY MAIL, Filed.
Feb. 7	(Appellee's) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed.
Feb. 17	Copy of INDEX of Designated Record forwarded to USCA8, via cert. mail, RRR.

Feb. 28 ORDER of USCA8 that appellant's motion for stay of further proceedings is Granted & the cause abated until 4-15-83, Filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
ET AL. DEFENDANTS.

CIVIL ACTION NO. A1-82-24
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNTIED STATES DEPARTMENT OF LABOR,
PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

STIPULATION

The parties hereto, by their undersigned counsel, stipulate and agree that the following agreed facts are the facts upon which the Court may make and enter findings of fact in these cases:

1. Pursuant to Section 11 of the Fair Labor Standards Act, [hereinafter the "Act"], compliance officers with the Wage-Hour Division of the U.S. Department of Labor [hereinafter the "Department"] enter establishments of employers and conduct investigations for compliance with the Act and related applicable statutes. In the case at bar, as in most, the compliance officer first arranges an appointment for that purpose.

2. The Department schedules investigations for several reasons. It may receive a complaint from a present or former employee or competitor. It may select an employer for an investigation because the employer is in an industry having generally consistent, industry-wide tendency to compensate employees in a particular manner, which the Department seeks to review. In any event, an investiga-

tion, once scheduled, is normally a comprehensive one with respect to compliance with the Act and related applicable statutes. The compliance officers instructions are to review compliance throughout that particular establishment, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation to that basis. For example, if a complaint is made to the Department by an employee for wage payments to him for one pay period, an investigation may be scheduled; if so, it would not be limited in scope to that basis and related matters. Also, for example, if an investigation is scheduled to review child labor practices, the investigation is not limited to that basis. However, in a few instances, the scope of the investigation may be limited, for example, to the child labor practices. If so, the compliance officer so informs the employer during the opening conference. The investigation sought to be conducted in the case at bar is a complete one, not a limited one. The Department does not disclose the basis for the investigation.

3. On January 6, 1982, Al Godes, a compliance officer with the Wage & Hour Division of the Department, whose office is in Bismarck, North Dakota, telephoned Lone Steer, Inc. [hereinafter "Lone Steer"], a restaurant-motel in Steele, ND, informing Susann White, its manager, that he would commence an investigation of Lone Steer the following morning at 9:00 a.m. Also, he told Ms. White to make available time, wage and payroll records for all employees for the last two years. Late that day, January 6, 1982, Ms. White called Mr. Godes back, stating that it was not convenient for Mr. Godes to conduct the investigation the following morning.

4. The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had rescheduled the investigation of Lone Steer for January 14, 1982 at 9:00 a.m. The letter stated:

> The Wage and Hour Division is responsible for the administration and enforcement of a number of Federal laws involving labor standards. These include the Fair Labor Standards Act, the Public Contracts Act, the Service Contract Act, the Age Discrimination in Em-

ployment Act, and Title III, Consumer Credit Protection Act. The Division also has certain responsibilities under the Davis-Bacon Act and related statutes, including the Contract Work Hours and Safety Standards Act.

This is to advise you that I will call at your establishment on the date and at the time shown above [i.e., January 14, 1982 at 9:00 a.m.] to determine compliance with the Fair Labor Standards Act (this will also include the other laws, as listed above, if any of these apply). Every effort will be made to conduct this assignment expeditiously and with a minimum of inconvenience to you and your employees.

If you or your designated representative will not be available on the date and at the time indicated above, please let me know promptly so that we can work out some other arrangement.

5. On January 12, 1982, Lone Steer's attorney, Richard G. Peterson, called Mr. Godes regarding the investigation of Lone Steer. Mr. Peterson informed Mr. Godes that he might be able to meet with Mr. Godes at Lone Steer, but that he would get back to Mr. Godes to confirm.

6. That same day, January 12, 1982, Mr. Peterson sent Mr. Godes a letter informing him that:

I represent Lone Steer Cafe in Steele, North Dakota.

Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).

If, on the other hand, you propose a general administrative inspection for compliance—not prompted by specific complaint—we request to know the scope of the investigation.

Until this matter is resolved, you do not have permission to conduct an investigation.

7. On January 14, 1982, Mr. Godes called Lone Steer, but could not reach Ms. White. Later that day, after Mr. Godes received Mr. Peterson's letter of January 12, 1982, Mr. Godes placed two more calls to Lone Steer, but could not reach Ms. White.

8. Mr. Godes forwarded Mr. Peterson's letter to the Regional Office of the Wage & Hour Division in Denver. On January 20, 1982, Loren E. Gilbert, the Assistant Regional Administrator for Wage & Hour, sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941).
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.
>
> I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Mr. Gilbert instructed Mr. Godes to attempt the investigation in the company of Gerald Hill, Assistant Area Director, Denver.

9. Mr. Peterson received Mr. Gilbert's letter on January 25, 1982. On January 28, 1982, Mr. Peterson called Mr. Gilbert to repeat that Mr. Godes did not have permission of Lone Steer to investigate. He also informed Mr. Gilbert that a warrant from an independent magistrate would be required under the U.S. Supreme Court ruling of *Marshall* v. *Barlow's, Inc.* Mr. Gilbert then instructed Mr. Godes to attempt the investigation and, in the event of the likely refusal of Lone Steer to permit such investigation, to serve

Lone Steer with an administrative *Subpoena Duces Tecum.*

10. On February 2, 1982, at approximately 10:30 a.m., Mr. Godes and Mr. Hill entered the Lone Steer establishment to attempt to conduct an investigation. They asked for Ms. White and were told she was not available but expected shortly. They were offered some coffee, and waited in the lobby area. After 20-30 minutes, when Ms. White had not appeared, Mr. Godes served an Administrative Subpoena Duces Tecum on employee Karen Arnold. The parties agree that Lone Steer was properly served with the subpoena.

11. The Administrative Subpoena is addressed to: "Any officer, agent or employee of Lone Steer, Inc., a corporation, ... having custody, personal knowledge, and information regarding the books, papers and documents described below." It further states:

> You are hereby required to appear before Al Godes of the Wage and Hour Division, United States Department of Labor, at Room 354, Federal Building, 3rd and Rosser in the City of Bismarck, North Dakota on the 9th day of February, 1982, at 11 o'clock a.m. of that day, to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc.
>
> And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:
>
> A. Payroll or other records covering the three-year time period prior to the date of this subpoena containing the following information with respect to each and every employee of Lone Steer, Inc.:
>
> (1) Name in full, and if used, any identifying symbol or number of the employee;
>
> (2) Home address, including zip code;
>
> (3) Date of birth, if under 19;
>
> (4) Occupation in which employed;
>
> (5) Time of day and day of week on which the employee's workweek begins;
>
> (6) Regular hourly rate of pay or any other basis on which wages are paid;

(7) Hours worked each workday and total hours worked each workweek;

(8) Total daily or weekly straight-time earnings;

(9) Total overtime compensation for the workweek;

(10) Total additions to or deductions from wages paid each pay period;

(11) Total wages paid each pay period;

(12) Date of payment and the pay period covered by payment.

B. Records showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies.

The subpoena was issued in Washington, D.C. on January 28, 1982 by William Otter, Administrator of the Wage and Hour Division.

12. On February 8, 1982, Mr. Peterson called Henry Mahlman, Counsel for the U.S. Department of Labor in Denver, to advise that Lone Steer would not comply, a position confirmed in his letter to Mr. Mahlman of February 10, 1982. The letter states:

> "This letter i[s] pursuant to our telephone conference on February 8, 1982 when I informed you that we view the Administrative Subpoena, attached hereto, issued by the Wage-Hour Administrator, U.S. Department of Labor, as invalid under the Fourth Amendment and the clear holding of Secretary of Labor *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 Sup. Ct. 1816, 56 L.Ed.2d 305 (1978). Accordingly, I further informed you that Lone Steer, Inc. would respectfully decline to respond to it. I also informed you that we are ready to defend against any motion or action the Labor Department deems appropriate to resolve the issue.
>
> The U.S. Supreme Court in *Barlow's* stressed the "presumptive" invalidity of warrantless inspections under regulatory statutes. We believe there is little doubt that a broad discovery device, a Subpoena, issued by the Department itself, cannot be utilized when entry to an employer's premises for purposes of a search and seizure is denied. As you recall, in *Barlow's*, your Department obtained a Court Order,

under "compulsory-process" provisions of OSHA, which was held invalid under the Fourth Amendment.

The issue is so important that we request that this matter be referred as expeditiously as possible to a forum for resolution. Accordingly, I am taking the extraordinary step of sending a copy of this letter to the U.S. District Court."

To date, there has been no response or appearance pursuant to the Subpoena.

/s/ _____
Richard G. Peterson
Peterson & Sasseville
Attorney for Lone Steer, Inc.
Dated: July 15, 1982

/s/ _____
HENRY C. MAHLMAN
Office of the Solicitor
U.S. Department of Labor
Dated: July 12, 1982

/s/ _____
CHARLES S. MILLER, JR.
Assistant United States Attorney
Dated: August 4, 1982
Attorneys for Raymond J. Donovan, Secretary of Labor, United States Department of Labor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR; AND AL GODES, COMPLIANCE OFFICER WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

SECOND VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

COMES NOW the Plaintiff, Lone Steer, Inc., and for its cause of action against the Defendants, Raymond Donovan, Secretary of Labor et al., states as follows:

I.

This action arises under Section 11 of the Fair Labor Standards Act (29 USC § 211) and the Fourth Amendment of the United States Constitution which presents a question of Federal Law conferring jurisdiction upon this Court.

II.

Plaintiff is a corporation duly organized under and by virtue of the Laws of the State of North Dakota and is qualified to do business and is doing business in the State of North Dakota and is subject to the Fair Labor Standards Act (hereinafter, the "Act").

III.

Defendant Donovan is United States Secretary of Labor and is charged with the enforcement of the Fair Labor Standards Act, which duties he may carry out through authorized agents. Defendant Gilbert is Assistant Regional

Administrator for Wage-Hour/ESA, United States Department of Labor; and Defendant Godes is a Compliance Officer with Wage-Hour Division, United States Department of Labor.

IV.

Section 11(a) of the Act is the inspection provision of the regulatory statute and specifically authorizes the Defendant Secretary of Labor or his designated representatives to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

V.

Pursuant to Section 11(a) of the Act, Defendant Godes, a designated representative of Defendant Secretary Donovan, has engaged in a pattern and practice of conducting Act compliance inspections of non-public premises and records of employers, without permission or consent of said employers, and without a warrant, by asserting his apparent authority. Also, during said inspections, Defendant Godes interrogated employees of said employers without employer or employee consent by asserting his apparent authority. The inspection methods of Defendant Godes created an atmosphere of provocation, tension, harrassment, disruption, ill will for employer representatives and employees alike.

VI.

On December 11, 1981, a former employee of the Plaintiff, Duane Irish, filed a Complaint with the North Dakota Department of Labor regarding a claim for one day's wages. The Complaint was subsequently refiled to the U.S. Department of Labor, Wage and Hour Division, Bismarck, North Dakota for investigation.

VII.

That Plaintiff has paid said former employee, Duane Irish, in full for the claimed wages.

VIII.

Pursuant to Section 11(a) of the Act, on or about the 5th day of January, 1982, Defendant Secretary of Labor, through his designated representative, Defendant Godes, contacted Plaintiff's manager to make arrangements to enter Plaintiff's place of business in Steele, North Dakota in order to institute an investigation to determine the Plaintiff's compliance with the Act.

IX.

Neither Plaintiff nor its representatives have questioned Plaintiff's status as subject to the Fair Labor Standards Act.

X.

On January 12, 1982 the Plaintiff through its attorney, Richard G. Peterson, attempted to obtain information regarding whether the investigation was a "general administrative inspection for compliance" or "prompted by specific complaint(s)" and as to the scope of investigation. Plaintiff's attorney stated that permission was not granted to inspect and would not be considered again until the purpose and scope of the investigation was disclosed.

XI.

Despite Plaintiff's denial of permission to conduct an inspection, Defendants unilaterally scheduled an inspection in Plaintiff's business offices in Steele, North Dakota on February 2, 1982. The letter dated January 20, 1982 (Exhibit A) states that Defendant Godes was instructed to conduct the inspection on Tuesday, February 2, 1982 at 10:30 A.M. at the Plaintiff's offices in Steele, North Dakota.

XII.

On February 2, 1982 Defendant Godes and Gerald H. Hill, appeared at the business premises of Plaintiff and were denied permission again to conduct an inspection.

They left at said premises an administrative Subpoena issued by the U.S. Labor Department itself, the Wage and Hour Administrator (attached hereto as Exhibit B), requiring the production of books, papers and documents before Defendant Godes in furthance [*sic*] of its investigation to determine Plaintiff's compliance with the Act.

XIII.

Use of the administrative Subpoena by Defendants, in furtherance of its attempted inspection at Plaintiff's premises, pursuant to Sections 11 and 9 of the Act, constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution. Also, said administrative Subpoena purports to authorize inspection of Plaintiff's records without a warrant or its equivalent. Further, said inspection and administrative Subpoena was prompted by a pending charge or complaint, which requires a warrant or its equivalent with a showing of probable cause. In any event, said administrative Subpoena is overly broad in scope and unreasonable.

XIV.

The Defendants' investigation pursuant to Section 11 and 9 of the Fair Labor Standards Act (29 USC § 211) constitutes and [*sic*] unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution.

XV.

As direct result of the investigation in violation of the Fourth Amendment of the United States Constitution, Plaintiff will suffer permanent and irreparable harm and injury.

XVI.

As a direct result of the investigation in violation of the Fourth Amendment of the United States Constitution, Plaintiff has no adequate remedy in a civil action at law.

XVII.

If the unconstitutional search and seizure is allowed to take place the Plaintiff will suffer far greater harm than the

Defendant would suffer from an injunction preventing such a search and seizure.

XVIII.

There exists an actual, justiciable case and controversy between the parties adversely and substantially interested in the matters stated in this Complaint.

WHEREFORE, the Plaintiff prays for Judgment as follows:

1. That a Preliminary Injunction be granted, enjoining Defendants from entering the Plaintiff's premises or seizing any of Plaintiff's property with an administrative Subpoena, without obtaining a warrant or its equivalent from an independent magistrate.

2. That a Permanent Injunction be granted enjoining the Defendants from entering Plaintiff's premises or seizing any of the Plaintiff's property with an administrative Subpoena, without obtaining a warrant or its equivalent from an independent magistrate.

3. That a Declaratory Judgment be granted declaring that the Fair Labor Standards Act is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative Subpoena after entry to inspect has been denied.

4. That Plaintiff be granted its costs, reimbursements and legal fees and other relief as the Court may deem just and equitable.

Dated this ____ day of ____ 1982.

PETERSON & SASSEVILLE

BY: _____

RICHARD G. PETERSON
Attorney at Law
Suite 400-WDAY Tower
808 Third Avenue South
Fargo, North Dakota 58103
Telephone: (701) 280-2800
Attorneys For Plaintiff

EXHIBIT A

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
1442 Federal Office Building
1961 Stout Street
Denver, Colorado 80294

January 20, 1982

Mr. Richard G. Peterson
Peterson & Sasseville
Attorneys at Law
Suite 400, WDAY Tower
808 3rd Ave. S.
Fargo, ND 58103

Re: Lone Steer, Inc.
SOL No. 5878

Dear Mr. Peterson:

This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (8th Cir. 1941).

Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.

I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Sincerely,

/s/ _____

LOREN E. GILBERT
Assistant Regional Administrator
for Wage-Hour/ESA

EXHIBIT B

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
SUBPOENA DUCES TECUM

To any officer, agent, or employee of LONE STEER, INC., a corporation, Steele, North Dakota 58482, having custody, personal knowledge, and information regarding the books, papers, and documents described below.

You are hereby required to appear before AL GODES of the WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, at Room 354, Federal Building 3rd and Rosser in the City of Bismarck, North Dakota on the 9th day of February, 1982, at 11 o'clock a.m. of that day, to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

A. Payroll or other records covering the three-year time period prior to the date of this subpoena containing the following information with respect to each and every employee of Lone Steer, Inc.:

(1) Name in full, and if used, any identifying symbol or number of the employee;

(2) Home address, including zip code;

(3) Date of birth, if under 19;

(4) Occupation in which employed:

(5) Time of day and day of week on which the employee's workweek begins;

(6) Regular hourly rate of pay or any other basis on which wages are paid;

(7) Hours worked each workday and total hours worked each workweek;

(8) Total daily or weekly straight-time earnings;

(9) Total overtime compensation for the workweek;

(10) Total additions to or deductions from wages paid each pay period;

(11) Total wages paid each pay period;

(12) Date of payment and the pay period covered by payment.

B. Records showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies.

FAIL NOT AT YOUR PERIL

IN TESTIMONY WHEREOF *I have hereunto affixed my signature and the seal of the* UNITED STATES DEPARTMENT OF LABOR AT WASHINGTON, D.C. this 28 day of January, 1982.

/s/ _____

WILLIAM M. OTTER
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Supreme Court of the United States

No. 82-1684

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS,

v.

LONE STEER, INC.

APPEAL from the United States District Court for the District of North Dakota.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

JUNE 6, 1983

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Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,

No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO DISMISS OR AFFIRM

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:

JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103

QUESTION PRESENTED

Whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant, as framed by the District Court in its Order. (J.S. at Appendix A)

PARTIES TO THE PROCEEDING

Lone Steer, Inc. was the Plaintiff in the District Court and is Appellee here.

TABLE OF CONTENTS

	Page
Opinions below	1
Constitutional and Statutory Provisions involved	1
Motion	3
Conclusion	4

TABLE OF AUTHORITIES

Cases:

Marshall v. *Barlow's, Inc.*
436 U.S. 307 ..... *3,4*

Constitution, statutes and regulations:

U.S. Const:
Amend. IV 1,3,4

Fair Labor Standards Act of 1938, 29 U.S.C. (Supp. V) 201 *et seq.*:
Section 9, 29, U.S.C. 209 2,4
Section 11, 29 U.S.C. 211 4
Section 11(a), 29 U.S.C. 211(a) 3,4

Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 41 *et seq.*:

Occupational Safety and Health Act of 1970:
29 U.S.C. 657 3

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OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (App. D, *infra*, 14a-15a) is not reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 9 of the Fair Labor Standards Act of 1938, 29 U.S.C. 209, provides:

> For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees.

Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documen-

tary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

MOTION

Appellee hereby moves the Court to dismiss the appeal or, in the alternative, affirm the decision of the District Court for the District of North Dakota.

The stipulated facts as well as the summary of facts in appellants' Jurisdictional Statement reveals an enforcement scheme that violates appellee's privacy right guaranteed by the Fourth Amendment to the

United States Constitution as defined by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

The undisputed facts reveal repeated attempts to enter the premises of appellee for the purpose of inspecting records. After acknowledging that the attempts to enter and inspect "unquestionably comport" with the provisions of the Fair Labor Standards Act of 1938, Section 11(a), the District Court addressed the controlling issue of the "constitutionally impermissible" nature of the statutory scheme (J.S. at Appendix A). The District Court held that the warrant requirement based on probable cause prior to nonconsensual searches applied to the Fair Labor Standards Act, Section 11(a), "with equal—if not greater—force" than to the Occupational Safety and Health Act of 1970, 29 U.S.C. 657 which was at issue in *Barlow's* (J.S. at Appendix A). Since the privacy interests to be protected under the Fourth Amendment related directly to entering the premises and inspecting the records under the Fair Labor Standards Act, Section 11(a), appellants' repeated attempts to enter the premises render invalid any claim that there has been, and is, no privacy interest involved in this matter.

Appellants apparently concede the applicability of the warrant requirement of the Fourth Amendment to the Constitution as defined in *Barlow's* to this matter. In appellants' Motion To Alter Or Amend Judgment, its only request was that an administrative subpoena duces tecum be allowed as the statutory enforcement mechanism (J.S. at Appendix E). The appellants did not request any change in the order of the District Court forbidding entry upon the premises of Lone Steer, Inc. for the purpose of inspecting its records under the Fair Labor Standards Act, Section 11(a), without first having obtained a valid warrant. The issue on appeal is the constitutional validity of the provisions of Section 11(a) of the Fair Labor Standards

Act which allows entering the premises for the purpose of inspection. That is the very issue which was decided by the District Court. Appellants are attempting to sidestep the constitutional principles of *Barlow's* in utilizing the enforcement mechanism of the Fair Labor Standards Act, Sections 11 and 9. A broad discovery devise, a subpoena, issued by the U.S. Labor Department itself, hardly may be viewed as the functional equivalent of a warrant, as required under *Barlow's*.

CONCLUSION

Since the decision of the District Court was based on *Marshall* v. *Barlow's, Inc.* 436 U.S. 307 (1978) as controlling precedent, the question is not substantial and this matter should be dismissed.

In the alternative, if the question is deemed to be substantial, the decision of the District Court was based on a thorough analysis of the Constitution, applicable federal statutes and judicial precedent. The decision should be affirmed.

Respectfully submitted,

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:
JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates

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BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Deputy Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the subpoena duces tecum issued to appellee pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. 209 and 211, violates the Fourth Amendment because it seeks to compel the production of relevant documentary evidence without a warrant.

II

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Al Godes and Loren Gilbert, two officers of the Department of Labor, were named as defendants in the district court and are appellants here.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 2

Statement 4

Summary of argument 8

Argument

The Fourth Amendment does not prohibit the use of an administrative subpoena duces tecum 10

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Blair v. *United States*, 250 U.S. 273 12

CAB v. *Hermann*, 353 U.S. 322, rev'g 237 F.2d 359 14

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 14

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 16

Donovan v. *Dewey*, 452 U.S. 594 15

Donovan v. *Mehlenbacher*, 652 F.2d 228 ..... 17, 18

Donovan v. *Shaw*, 668 F.2d 985 17

EEOC v. *Bay Shipbuilding Corp.*, 668 F.2d 304 17

Fisher v. *United States*, 425 U.S. 391 14

Page

Cases—Continued:

Grand Jury Proceedings, In re, 601 F.2d 162 17

Inland Steel Co., In re, 492 F. Supp. 1310 18

Kulp Foundry, Inc., In re, 691 F.2d 1125 18

Marshall v. *Barlow's Inc.*, 436 U.S. 307 ..... 6, 7, 9, 15, 16, 17, 18

Marshall v. *Stevens People & Friends for Freedom*, 669 F.2d 171, cert. dismissed, 455 U.S. 930 17

Marshall v. *Walbridge*, 84 Lab. Cas. (CCH) para. 33,723 17

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 ..... 8, 11, 12, 13, 15, 16, 17

See v. *City of Seattle*, 387 U.S. 541 ..... 9, 14, 16

Shapiro v. *United States*, 335 U.S. 1 ..... 10, 18

United States v. *Miller*, 425 U.S. 435 ..... 13, 17

United States v. *Morton Salt Co.*, 338 U.S. 632 13

United States v. *Powell*, 379 U.S. 48 13

Zurcher v. *Stanford Daily*, 436 U.S. 547 18

Constitution, statutes and regulations:

U. S. Const. Amend. IV (Warrant Clause) ..... *passim*

Department of Energy Act of 1978, 42 U.S.C. (Supp. V) 7255 10

Page

Constitution, statutes and regulations—Continued:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1134(c) 10

Fair Labor Standards, Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.* :

Section 9, 29 U.S.C. 209 ..... 2, 4, 7, 8
Section 11, 29 U.S.C. 211 ..... 2, 4, 8
Section 11(a), 29 U.S.C. 211(a) 2
Section 11(c), 29 U.S.C. 211(c) 6, 7

Federal Communications Act, 47 U.S.C. 409(e) 10

Federal Mine Safety and Health Act, 30 U.S.C. 813(d) 10

Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 41 *et seq.* :

Section 9, 15 U.S.C. 49 ..... 3, 4, 8, 10
Section 10, 15 U.S.C. (& Supp. V) 50 4

Internal Revenue Code, 26 U.S.C. 7602 10

Interstate Commerce Act, 49 U.S.C. (Supp. V) 10321(c) 10

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 521(b) 10

National Labor Relations Act, 29 U.S.C. (& Supp. V) 161 10

Occupational Safety and Health Act of 1970, 29 U.S.C. 657:

29 U.S.C. 657(a) 7, 9, 15

29 U.S.C. 657(b) 17

Page

Constitution, statutes and regulations—Continued:

Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. 743 ..... 4, 16

29 C.F.R. :

Section 516.2(a) 6
Section 516.5(c) 6

Miscellaneous:

2 W. LaFave, *Search and Seizure* (1978) 13

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OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (J.S. App. 14a-17a) is not reported.

JURISDICTION

The judgment of the district court (J.S. App. 9a-10a) was entered on October 28, 1982. A motion to alter or amend the judgment was denied on November 24, 1982 (J.S. App. 13a-14a). The notices of appeal to this Court were filed on December 15, 1982 (J.S. App. 11a-12a). On February 4, 1983, Justice Blackmun extended the time within which to docket the appeal to and including April 14, 1983. The Jurisdictional Statement was filed on that date, and the Court noted probable jurisdiction on June 6, 1983 (J.A. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

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Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena

issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

STATEMENT

1. On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned appellee, a motel-restaurant located in Steele, North Dakota, and informed its manager, Susanne White, that he would commence an investigation of the establishment the following morning. Godes requested White to have available for inspection time, wage and payroll records for all employees for the past two years (J.S. App. 2a; J.A. 12). The investigation was to be conducted pursuant to Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 211, and its purpose was to determine whether appellee was in compliance with the FLSA.[1] White telephoned Godes later that

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[1]Section 11 of the FLSA authorizes the Secretary of Labor to conduct investigations to determine whether any provision of the Act has been violated. Specifically, he is authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate." These investigatory powers are augmented by Section 9 of the FLSA, 29 U.S.C. 209, which, by incorporating by reference Sections 9 and 10 of the Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 49 and 50, authorizes the Secretary "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." (The codification of Section 11 refers to the authority of the Wage-Hour Administrator, but under Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. 743, all functions of all other officers of the Department of Labor are transferred to the Secretary of Labor, although the Secretary may delegate those functions to other officers.)

day and informed him that it would not be convenient to conduct the inspection the following morning (J.S. App. 2a; J.A. 12).

The investigation was then rescheduled for January 14, 1982 (J.S. App. 2a; J.A. 12-13). On January 12, 1982, however, appellee's attorney sent a letter to Godes inquiring about the scope of and reason for the investigation and stating that "[u]ntil this matter is resolved, you do not have permission to conduct an investigation" (J.S. App. 3a; J.A. 13). The Department of Labor, represented by Loren Gilbert, Assistant Regional Administrator for the Wage and Hour Division, replied by letter on January 20, 1982, outlining the general scope of an FLSA investigation, but refusing to explain the reasons for the investigation of appellee because the Secretary's investigatory powers under the FLSA do not depend upon the filing of a complaint (J.S. App. 3a-4a; J.A. 14). Gilbert also asked appellee to inform him if it intended to withhold consent for the rescheduled investigation, "so that I can request an administrative subpoena in order to conduct the investigation" (J.S. App. 4a; J.A. 14). Shortly thereafter, appellee's attorney informed Gilbert that appellee would not permit the investigation without a search warrant issued by an independent magistrate (*ibid.*).

Under instructions to attempt the investigation of appellee and, if permission were refused, to serve an administrative subpoena duces tecum, Godes entered the public lobby area of appellee's premises on February 2, 1982. When the manager did not appear, Godes served the subpoena on an employee of appellee (J.S. App. 4a; J.A. 14-15).[2] The subpoena, signed by the Administrator of the Wage-Hour Division, requested that an officer, agent or employee having

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[2]It is uncontested that appellee was properly served with the subpoena (J.S. App. 4a; J.A. 15).

custody and personal knowledge of appellee's records appear at the Wage-Hour office in Bismarck, North Dakota, on February 9, 1982, to testify regarding appellee's wage practices and to produce certain records. The request was specifically limited to records required by law to be kept by employers, namely, payroll data and sales records relevant to whether the company was covered by the FLSA (see J.A. 25-26).[3] Appellee's attorney subsequently informed the Department of Labor that appellee would not comply with the administrative subpoena on the ground that it was invalid under *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (J.S. App. 5a; J.A. 16-17).

2. Appellee challenged the validity of the subpoena by commencing this action against appellants, the Secretary of Labor, Godes, and Gilbert, in the United States District Court for the District of North Dakota. The amended complaint alleged, *inter alia*, that "[u]se of the administrative [s]ubpeona by [appellants] * * * constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution. Also, said administrative subpoena purports to authorize inspection of [appellee's] records without a warrant or its equivalent" (J.A. 21). Appellee sought preliminary and permanent injunctions prohibiting appellants from "entering [its] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant" (J.A. 22). In addition, appellee's complaint sought a declaratory judgment that the FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative [s]ubpoena after entry to inspect has been denied" (J.A. 22). On March 3, 1982, the Secretary of

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[3]Regulations implementing 29 U.S.C. 211(c) require employers to maintain the type of information requested. See 29 C.F.R. 516.2(a) (payroll information) and 516.5(c) (sales and purchase records).

Labor petitioned the district court to compel appellee to comply with the administrative subpoena. The district court consolidated appellee's injunctive and declaratory judgment action with the Secretary's enforcement action.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellee in each case, holding that enforcement of the subpoena would violate the Fourth Amendment (J.S. App. 1a-9a). The court first expressly found that "[t]he actions of the Secretary * * * unquestionably comport" with the provisions of the FLSA setting forth his investigative powers (*id.* at 6a). The court noted that Section 11(c) of the FLSA "specifically authorize[s] the Secretary's representatives to inspect, review and transcribe the records described in the administrative subpoena, and require[s] [appellee] to make those records available for such purposes" and that Section 9 of the Act authorizes the use of subpoenas to require the production of records (J.S. App. 6a). Hence, the court stated, the controlling issue was appellee's contention that "this statutory scheme is constitutionally impermissible and that the records described in the administrative subpoena issued in this case need not be produced except in response to a warrant issued by a judicial officer upon a showing of probable cause," a contention based exclusively on *Marshall* v. *Barlow's, Inc., supra* (J.S. App. 6a).

The district court held that this Court's decision in *Barlow's*, which required a warrant based on probable cause prior to non-consensual searches of work areas under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), applied to FLSA investigations (J.S. App. 7a-8a). Indeed, because there is a more compelling basis for proceeding with a warrantless inspection directed at health and safety than one directed at compliance with wage and hour regulations, the court remarked that the reasoning of

Barlow's "applies with equal — if not greater — force in the instant situation" (*id.* at 8a). Accordingly, the court concluded that "the Secretary * * * may *not* proceed to enter upon the premises of [appellee] for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant" (*ibid.*; emphasis in original). In effect, the court held unconstitutional Sections 9 and 11 of the FLSA, 29 U.S.C. 209 and 211, which, by reference to 15 U.S.C. 49, give the Secretary administrative subpoena power to inspect relevant documents without resort to a warrant.

Because the language of the district court's order barred the Secretary from "enter[ing] upon [appellee's] premises" to inspect the records and thus did not "address the relief sought by the Secretary" (J.S. App. 15a), the Secretary filed a motion to alter or amend the judgment (*id.* at 15a-17a) by ordering appellee to comply with the subpoena by producing the records at the place named therein, *i.e.*, the Bismarck office of the Wage and Hour Division (see J.A. 25). Such compliance, of course, would not involve an entry onto appellee's premises. The court denied the motion without explanation (J.S. App. 13a-14a).

SUMMARY OF ARGUMENT

The district court's unexplained ruling that the Secretary of Labor violated the Fourth Amendment by using a subpoena duces tecum to obtain business records, rather than a warrant based on probable cause, disregards the consistent decisions of this Court and misconceives the purpose and scope of the constitutional protection against "unreasonable searches and seizures."

This Court has repeatedly held that administrative agencies may obtain documents relevant to an authorized investigation by resort to a subpoena duces tecum. Indeed, the leading case on this point, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upheld the validity of the

administrative subpoena provisions of the Fair Labor Standards Act, the very statute struck down by the district court in this case. Because a subpoena involves only a "constructive search," its reasonableness is guaranteed by safeguards different from those of the Warrant Clause. *Id.* at 208-209. Specifically, the constitutional standard is satisfied if the subpoena duces tecum is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). The subpoena at issue here plainly met these requirements because it sought production of a discrete category of employee payroll and sales records.

The district court's cryptic decision appears to rest on the unstated premise that *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), overruled the long line of cases upholding the validity of administrative subpoenas. There is no basis for this premise. In *Barlow's*, this Court held unconstitutional the Secretary of Labor's authority to conduct warrantless entries under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), to search work areas for safety or health hazards. But a subpoena, unlike the searches involved in *Barlow's*, does not require or authorize an entry onto private premises. Moreover, the concerns identified by the Court in connection with warrantless OSHA inspections — namely, the unbridled discretion given to officers in the field and the failure to advise the owner of the scope of the search (see 436 U.S. at 323) — simply are not present in the subpoena context. A subpoena specifies the particular documents sought, and it can be enforced only pursuant to court proceedings in which the subpoenaed party may raise objections to its reasonableness. Thus, nothing in *Barlow's* suggests that a warrant based on probable cause must always be used instead of a subpoena.

In sum, the well-established standards governing the specificity and relevance of administrative subpoenas duces tecum adequately protect the legitimate privacy interests of the subpoenaed party. This is particularly true where, as here, the subpoenaed documents are business records required to be kept by law. See *Shapiro* v. *United States*, 335 U.S. 1, 32-35 (1948). The district court's ruling, by eliminating subpoenas duces tecum as an investigative tool and requiring warrants based on probable cause, both frustrates legitimate law enforcement efforts and offers less protection of privacy concerns.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT THE USE OF AN ADMINISTRATIVE SUBPOENA DUCES TECUM

In 1914, Congress conferred upon the Federal Trade Commission the power to subpoena from private persons or companies documents relevant to any matter under investigation. See 15 U.S.C. 49. Since that time, Congress has enacted scores of statutes, including the provisions of the Fair Labor Standards Act at issue here, that confer similar powers on other agencies.[4] This Court has consistently held that the Fourth Amendment does not prohibit the use of this indispensable investigative device. In this case, however, the district court, without any analysis, refused to enforce a routine subpoena duces tecum issued by the Secretary of Labor on the ground that the subpoena

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[4]See, *e.g.*, 49 U.S.C. (Supp. V) 10321(c) (Interstate Commerce Act); 47 U.S.C. 409(e) (Federal Communications Act); 42 U.S.C. (Supp. V) 7255 (Department of Energy Act of 1978); 30 U.S.C. 813(d) (Federal Mine Safety and Health Act); 29 U.S.C. 1134(c) (Employee Retirement Income Security Act of 1974); 29 U.S.C. 521(b) (Labor-Management Reporting and Disclosure Act of 1959); 29 U.S.C. (& Supp. V) 161 (National Labor Relations Act); 26 U.S.C. 7602 (Internal Revenue Code).

provisions of the FLSA are unconstitutional. The court held that the Fourth Amendment permits the examination of business records only pursuant to a warrant supported by probable cause. This decision completely misconceives the purpose and scope of the Fourth Amendment and is manifestly erroneous.

A. Few propositions are better settled today than the validity of an agency's power to issue an administrative subpoena duces tecum for relevant documents without the need to resort to a warrant based on probable cause. In fact, the leading case on this point, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upheld the validity of the very statute held unconstitutional in this case. Thus, the district court's decision here is inexplicable.

In *Oklahoma Press*, this Court unequivocally rejected the contention that the subpoena power conferred by the FLSA is unconstitutional. 327 U.S. at 195-214. The Court held that the statutory authority to examine documents without a warrant based on probable cause does not violate the Fourth Amendment's proscription against "unreasonable searches and seizures." The Court stated that the execution of a subpoena for specific documents is not an "actual search and seizure" (*id.* at 195) and ruled that the requirements of the Warrant Clause of the Fourth Amendment accordingly are inapplicable. The Court observed that in enforcing a subpoena "[n]o officer or other person [seeks] to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections." 327 U.S. at 195. Rather, the Court held, the issuance of a subpoena is a "constructive search" (see generally *id.* at 202-208) that, to the extent the Fourth Amendment applies to it at all, is governed by the constitutional requirement that it not be "unreasonable." *Id.* at 208.

The "reasonableness" of an administrative subpoena, the Court explained, is guaranteed by safeguards different from the warrant based on probable cause required in other contexts to support "actual searches." 327 U.S. at 209. The protections offered by the Fourth Amendment in the subpoena context are avoiding "too much indefiniteness or breadth in the things required to be 'particularly described' " and ensuring that "the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. Affording the subpoenaed company the right to a judicial determination of the validity of the subpoena before enforcement prevents these kind of abuses. *Id.* at 209, 217.

Thus, the Court explicitly held that the FLSA Administrator's subpoena authority is not " 'limited . . . by forecasts of the probable result of the investigation.' " 327 U.S. at 216, quoting *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Instead, protection analogous to the probable cause standard is provided in the subpoena context by "the court's determination that [1] the investigation is authorized by Congress [and] is for a purpose Congress can order, * * * [2] the documents sought are relevant to the inquiry * * * [and] [3] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry." *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. at 209 (footnote omitted). Accordingly, the Court held that, in the case of an FLSA administrative subpoena, "[i]t is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 208-209.

Oklahoma Press is generally recognized as the principal decision governing the Fourth Amendment limitations on the administrative subpoena power (see, *e.g.*, 2 W. LaFave, *Search and Seizure* § 4.13, at 191-193 (1978)), but the Court has addressed the subpoena power on several subsequent occasions. These cases reaffirm the fundamental principle that probable cause is not a prerequisite to the issuance and enforcement of a subpoena duces tecum. For example, in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), a unanimous Court relied on *Oklahoma Press* in upholding the Federal Trade Commission's power to compel corporations to file reports concerning their compliance with a cease and desist order. The Court emphatically rejected the contention that the reporting requirement was invalid because it was not based on probable cause; to the contrary, the Court stated that regulatory "agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest" even if a request for information or documents is prompted by "nothing more than official curiosity." *Id.* at 652. A regulatory agency is authorized "[to] take steps to inform itself as to whether there is probable violation of the law" (*id.* at 643); like a grand jury, it must have the "power to get evidence * * * merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" (*id.* at 642-643).

More recently, the Court has rejected several attempts to deviate from the *Oklahoma Press* standards and engraft more stringent Fourth Amendment limitations on particular types of subpoenas. In *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976), the Court held that probable cause was not a prerequisite to enforcement of a subpoena issued to a bank for a depositor's account records. In *United States* v. *Powell*, 379 U.S. 48, 57 (1964), the Court cited the general rule of *Oklahoma Press* in holding that the Internal

Revenue Service did not need probable cause to issue a document summons in connection with a fraud investigation. See also *Fisher* v. *United States*, 425 U.S. 391, 401, 406 (1976); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63-67 (1974) (financial institution reporting requirements). Thus, as the Court stated in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted): "[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Under this established body of law, there can be no doubt that the subpoena issued in this case should have been enforced. The district court did not suggest that the subpoena was unduly general or burdensome or invalid on relevancy grounds, and it cannot seriously be contended that it was.[5] The document request was limited to (a) three years of payroll records containing routine wage and hour information that was plainly relevant to investigating compliance with FLSA requirements; and (b) sales records relevant to determining whether appellee was covered by the FLSA (see J.A. 25-26).[6] The request thus was specific and sought only relevant documents, and it surely met the recognized constitutional requirements. Compare *CAB* v. *Hermann*, 353 U.S. 322 (1957), rev'g 237 F.2d 359 (9th Cir. 1956) (upholding subpoena against contention that it was excessively broad).

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[5]Appellee asserted in its complaint that the subpoena was "overly broad in scope and unreasonable" (J.A. 21). Apparently this was not a serious contention, however, because appellee's brief in support of its motions for summary judgment and to dismiss did not elaborate on any objections to the particular subpoena issued here, but rather only contested the validity of using a subpoena at all.

[6]Appellee subsequently acknowledged in its complaint that it was subject to the Act (J.A. 20).

B. The district court made no attempt to harmonize its decision with this established line of authority. Indeed, the court did not even acknowledge the existence of *Oklahoma Press* or the other subpoena cases decided by this Court. Instead, the district court relied exclusively on *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). Thus, the decision below appears to rest on the premise that *Barlow's* overruled sub silentio *Oklahoma Press* and the other cases upholding the constitutionality of administrative subpoenas. That unstated premise is patently wrong.

Barlow's concerned the inspection provisions of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. 657(a), which authorized the Secretary of Labor to conduct a warrantless search of the work area of any employment facility in interstate commerce for safety hazards and violations of OSHA regulations. *Barlow's* thus involved a broad administrative power to enter and inspect private premises, and the consequent invasion of privacy, that was unrestrained by any prior judicial review. The Court characterized the OSH Act as "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. Moreover, the Court noted, the statute did not require the inspector to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Ibid.*; footnote omitted. A warrant requirement, the Court concluded, would obviate both of those problems by delimiting the scope of the search and "provid[ing] assurances from a neutral officer" that the proposed search was reasonable and authorized by statute. *Ibid.*; see also *Donovan* v. *Dewey*, 452 U.S. 594, 601 (1981).

These concerns have no application to the "constructive search" involved in the enforcement of an administrative subpoena. The FLSA subpoena does not confer unbridled discretion upon the officer in the field. It is issued by the Wage-Hour Administrator (see *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942)),[7] and it can be enforced only by resort to adversary court proceedings in which the subpoenaed party may raise objections to its reasonableness. See *See* v. *City of Seattle, supra*, 387 U.S. at 544-545; *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 U.S. at 217. The subpoena is not open-ended like the search in *Barlow's*; it identifies the particular documents to be submitted. See *See* v. *City of Seattle, supra*, 387 U.S. at 544. And most important, the subpoena does not require an entry onto the employer's non-public premises. The subpoenaed company itself, rather than an agency investigator, combs its files to find the documents specified in the subpoena. Nothing is exposed to the agency's view other than the relevant documents. Thus, the subpoena procedure provides in every respect the Fourth Amendment protection that the Court found lacking in *Barlow's* in the absence of a warrant.

In fact, the Court's opinion in *Barlow's* itself undermines the district court's view that, in order to satisfy the Fourth Amendment, a regulatory agency may investigate only by means of a warrant based upon probable cause.[8] The Court

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[7]In *Cudahy*, the Court held that the Administrator could not delegate his statutory authority to issue subpoenas. We note that in Reorg. Plan No. 6 of 1950, Congress transferred this authority to the Secretary of Labor or his delegate. See note 1, *supra*. Pursuant to a delegation by the Secretary, however, the Department has maintained a consistent practice of having the Administrator issue FLSA subpoenas.

[8]Significantly, the Court in *Barlow's* relied heavily (see 436 U.S. at 312-313) on *See* v. *City of Seattle, supra*, which, while establishing an administrative warrant requirement for fire inspections, also confirmed

noted that the injunction affirmed in *Barlow's* "should not be understood to forbid the Secretary from exercising the inspection authority conferred by [the OSH Act] pursuant to regulations and judicial process that satisfy the Fourth Amendment." 436 U.S. at 325 n.23. This statement appears to contemplate the continued validity of subpoenas, which are recognized as a primary means of investigating through the judicial process and are expressly authorized by the OSH Act, 29 U.S.C. 657(b). Thus, *Barlow's* plainly preserves "the traditional distinction between a search warrant and a subpoena" (*United States* v. *Miller, supra*, 425 U.S. at 446), and the lower courts consistently have held that nothing in *Barlow's* undermines the long established validity of administrative subpoenas. See *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 312-313 (7th Cir. 1981); *In re Grand Jury Proceedings*, 601 F.2d 162, 168 & n.1 (5th Cir. 1979); *Marshall* v. *Walbridge*, 84 Lab. Cas. (CCH) para. 33,723 (N.D. Ind. 1978). See also, *e.g.*, *Marshall* v. *Stevens People & Friends for Freedom*, 669 F.2d 171, 176 (4th Cir. 1981), cert. dismissed, 455 U.S. 930 (1982); *Donovan* v. *Shaw*, 668 F.2d 985, 989 (8th Cir. 1982); *Donovan* v. *Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981) (enforcing Department of Labor subpoenas without specific discussion of *Barlow's*).[9]

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the basic principle of *Oklahoma Press* that the Fourth Amendment constraints on an administrative subpoena duces tecum relate to relevance and burdensomeness, not probable cause. See 387 U.S. at 544.

[9]The Court's opinion in *Barlow's* does note that its invalidation of the OSH Act's warrantless inspection provision also applies to an inspection of documents. 436 U.S. at 324 n.22. That comment was made, however, in the context of an entry onto the employer's non-public premises to effect, *inter alia*, a broad inspection of documents in the absence of either a warrant or a subpoena. It certainly does not suggest that a warrant, rather than a subpoena, is necessary for every inspection of documents. Indeed, the Court's primary objection to the document search was the failure to "delineat[e] the scope of [the] search" (*ibid.*), a function that manifestly is performed satisfactorily by a subpoena.

C. Thus, the district court's holding that the Secretary may examine documents relevant to a FLSA investigation only pursuant to a warrant based on probable cause, not a subpoena, is at odds with the consistent decisions of this Court. In addition, the holding makes no sense from the standpoint of the purposes of the Fourth Amendment. The preference for a warrant instead of a subpoena turns accepted Fourth Amendment principles on their head. It is generally recognized that a subpoena duces tecum, which allows the recipient of the subpoena (rather than a law enforcement officer) to search for the relevant documents, is substantially *less* intrusive of privacy interests than a search warrant. See, *e.g., Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563 (1978); *id.* at 571, 573 (Stewart, J., dissenting).[10] Hence, eliminating the availability of an administrative subpoena duces tecum and requiring a regulatory agency to resort to a search warrant does not enhance the protection of privacy.

Finally, this case is a peculiarly inappropriate one in which to characterize a routine administrative subpoena as an undue intrusion into a legitimate privacy interest. All of the records subpoenaed here are ones that are required by law to be maintained. See note 3, *supra*. Thus, the records have a public aspect that vitiates any claim by appellee of a reasonable expectation of privacy in their contents. See, *e.g., Shapiro* v. *United States*, 335 U.S. 1, 32-35 (1948); *Donovan* v. *Mehlenbacher, supra*, 652 F.2d at 231. If the government is empowered to require employers to maintain certain records to help assure compliance with the FLSA,

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[10]Indeed, despite *Barlow's*, some lower courts have held that, because of the safeguards provided by the subpoena process, Congress intended that OSHA inspectors always use a subpoena to inspect documents, and therefore that they may not use a warrant for that purpose. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1130-1133 (3d Cir. 1982); *In re Inland Steel Co.*, 492 F. Supp. 1310 (N.D. Ind. 1980).

the government ought to be able to see those records without having to demonstrate probable cause that a statutory violation exists. In sum, the subpoena issued here involved at most a minimal invasion of appellee's privacy, and it was manifestly reasonable within the meaning of the Fourth Amendment.[11] The district court's refusal to enforce the subpoena cannot be countenanced.

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[11]Appellee states that there is a substantial privacy interest involved here because of the government's "repeated attempts to enter the premises." Mot. to Dis. or Aff. 4. This contention is mystifying. It is uncontested that no government official made any attempt to enter appellee's private premises when consent to enter was refused. The only means used to compel production of the documents was the subpoena duces tecum returnable at the Department of Labor's offices. The fact that the district court's opinion and judgment specifically bar the Secretary of Labor from "enter[ing] upon the premises of appellee" (J.S. App. 8a-10a) introduces some confusion on this point. Examination of the facts and pleadings make clear, however, that this phrasing is simply careless drafting and that no issue involving a physical entry onto appellee's premises, either for a general inspection or to inspect subpoenaed documents, is involved in this case.

First, and foremost, the subpoena at issue specifically requested production of the documents at the local Wage-Hour office (see J.A. 15, 25). The relief sought by the government was an order requiring appellee to appear "at such time and place as this Court may order" and produce the documentary evidence "as required by the said *subpoena duces tecum*." Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 4. Thus, the validity of an entry onto appellee's premises was not even before the district court.

The papers filed by the parties confirm that the issue litigated in the district court was the warrantless "search" involved in the inspection of the documents, rather than an entry that the government did not even seek. The stated basis for the contention in appellee's complaint that the subpoena violated the Fourth Amendment was the allegation that the subpoena "purports to authorize inspection of [appellee's] records without a warrant or its equivalent * * * [and] probable cause" (J.A. 21). The government emphasized in its papers that the subpoena did not require entry onto appellee's premises, stating that compliance officers "are instructed not to enter any non-public area of any establishment without the employer's permission" and that, if an employer does not

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

FRANCIS X. LILLY
Deputy Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor

AUGUST 1983

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want to have its records reviewed on its premises, "compliance officers will agree to any other reasonable arrangements to review the records off the employer's premises." Mem. in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 13. Finally, the fact that the subpoena did not contemplate entry onto appellee's premises was again brought to the district court's attention in the government's Motion to Alter or Amend the Judgment (J.S. App. 15a-17a). The court's denial of that motion (*id.* at 13a-14a) plainly demonstrates that its decision holds unconstitutional the use of an administrative subpoena to inspect documents even off the employer's premises.

Supreme Court, U.S.
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No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR APPELLEE

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:

JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103

QUESTION PRESENTED

As framed by the district court in its Order, the question presented is "[w]hether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant" (J.S.APP.1a).

TABLE OF CONTENTS

Page

Questions Presented..... 1

Statement..... 2

Summary of Argument 7

Arguments..... 8

It is beyond dispute that the Warrant Clause applies to the unrestricted entry and inspection provisions of Section 11 of The Fair Labor Standards Act; the injunction - forbidding entry and inspection and the Declaratory judgment properly granted by the district court.

The administrative subpoena duces tecum, an enforcement device of Section 11 of the Fair Labor Standards Act — which is clearly subject to the Warrant Clause — is not the functional equivalent of a warrant.

Conclusion..... 13

TABLE OF AUTHORITIES

CASES:

Cudahy Packing Co. v. Holland, 315 U.S. 357..... 3

Marshall v. Barlow's, Inc. 436 U.S. 307..... 4, 6, 7, 8, 12, 13

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const.:

Amend. IV. 5, 6, 7, 10, 11

Warrant Clause 8, 9, 10

Fair Labor Standards Act of 1938, 29 U.S.C. 201 et seq:

Section 9,29 U.S.C.209 .....

Section 11,29 U.S.C.211 2, 3, 4, 5, 6, 7, 9, 10, 11, 12

MISCELLANEOUS

Wage and Hour Division's Field Handbook §86b00..... 11, 12

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v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR APPELLEE

STATEMENT

1. Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) provides that officers of the Wage and Hour Division of United States Department of Labor may enter upon the premises of certain business establishments and conduct investigations with an eye to compliance with the act and related regulations. The compliance officer is under instructions to review compliance throughout the particular establishment to be reviewed, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation. In the instant case, the investigation sought to be conducted is unlimited in scope (J.S.App.2a.; J.A.11). The Department does not disclose the basis for the investigation (J.A.12).

On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the Department of Labor telephoned Susanne White, manager of appellee, Lone Steer, Inc., a motel-restaurant located in Steele, North Dakota and informed her that he would commence an investigation of appellee the following morning at 9:00 a.m. Also, he told Ms. White to make available to him, wage and payroll records for all employees for the last two years. Later that day, Ms. White called Mr. Godes back, stating that it was not convenient for Mr. Godes to conduct the investigation on the following morning (J.S.App.2a; J.A.12). The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had once again scheduled the investigation of Lone Steer, Inc., and that this investigation would take place one week later on January 14, 1982, at 9:00 a.m. (J.S.App.2a; J.A.12). On January 12, 1982, Lone Steer's attorney, Richard G. Peterson, sent a letter to Mr. Godes stating:

> I represent Lone Steer Cafe in Steele, North Dakota.

> Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).
>
> If, on the other hand, you propose a general administrative inspection for compliance - not prompted by specific complaint - we request to know the scope of the investigation.
>
> Until this matter is resolved, you do not have permission to conduct an investigation (J.S.App. 3a; J.A.13).

The letter from Mr. Peterson was forwarded by Mr. Godes to Mr. Loren E. Gilbert, Assistant Regional Administrator for the Wage and Hour Division, at the regional office of the Wage and Hour Division in Denver, Colorado. On January 20, 1982, Mr. Gilbert sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Mr. Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Fair Labor Standards Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be used. See *Cudahy Packing Co. v. Fleming*, 122 F. 2d 1005 (8th Cir. 1941).
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act:
>
> I have instructed Mr. Godes to initiate this

> investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation (J.S.App.3a-4a;J.A.14).

Mr. Gilbert instructed Mr. Godes to attempt the investigation in the company of Mr. Gerald Hill, Assistant Area Director, Denver, Colorado (J.S.App.3a-4a;J.A.14).

On January 28, 1982, after receipt of the letter from Mr. Gilbert, Mr. Peterson called Mr. Gilbert to once again affirm Lone Steer's position that Mr. Godes did not have permission to investigate without obtaining a warrant from an independent magistrate as required by the ruling of this Court in *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978). Thereafter Mr. Gilbert directed Mr. Godes to attempt the investigation of Lone Steer, Inc. without obtaining a warrant from an independent magistrate and, in the event of refusal, to serve Lone Steer, Inc., with an administrative subpoena duces tecum pursuant to Section 9 of the Fair Labor Standards Act (29 U.S.C. §209) as part of its enforcement scheme (J.S.App.4a; J.A.14-15).

On February 2, 1982, at approximately 10:30 a.m., Mr. Godes, accompanied by Mr. Hill, entered the premises of Lone Steer, Inc., in an attempt to conduct an investigation. They were informed that Ms. White was not available at that time and were offered some coffee while they waited in the lobby area. After twenty to thirty minutes Mr. Godes properly served an administrative subpoena duces tecum on Karen Arnold, an employee of Lone Steer, Inc. (J.S.App.4a; J.A.15).

The administrative subpoena duces tecum had

been issued in Washington D.C. on January 28, 1982, over the signature of William Otter, Administrator of the Wage and Hour Division of the U.S. Department of Labor (J.S.App.5a; J.A.16). On February 8, 1982, Mr. Peterson called Henry Mahlman, counsel for the U.S. Department of Labor in Denver, Colorado, to reiterate Lone Steer, Inc.'s position that a warrant from an independent magistrate was required for the inspection (J.S.App.5a; J.A.16-17). Mr. Peterson confirmed Lone Steer, Inc.'s position in a letter to Mr. Mahlman on February 10, 1982 (J.S.App.5a; J.A. 16-17).

2. Lone Steer, Inc., initiated an action against the appellants, in the United States District Court for the District of North Dakota alleging that the appellants' investigation pursuant to Section 11 and Section 9 of the Fair Labor Standards Act (29 U.S.C.§209,§211) constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution (J.A.21). The relief sought by Lone Steer, Inc., included a preliminary injunction and permanent injunction enjoining appellants from entering Lone Steer, Inc.'s premises or seizing any of Lone Steer Inc.'s property with an administrative subpoena, without obtaining a warrant or its equivalent from an independent magistrate. Lone Steer, Inc., also requested that a Declaratory Judgment be granted declaring that the Fair Labor Standards Act (29 U.S.C. §201 et seq) is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative subpoena after entry to inspect has been denied (J.A.22). The Secretary of Labor initiated an action in the same court to enforce the administrative subpoena. The district court consolidated the actions and issued its order on October 27, 1982 (J.S.App.1a-8a).

After noting that all operative facts had been stipulated, the court identified the central issue as

whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer, Inc.'s records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant (J.S.App.1a). The district court resolved the issue by granting summary judgment in favor of the Appellee and denying summary judgment to the Appellants (J.S.App.8a).

In its order, the district court noted that the repeated attempts by the agents of the Secretary to inspect, review and transcribe the records - as well as the use of an administrative subpoena after permission to enter was repeatedly denied-"unquestionably comport with the provisions of the Fair Labor Standards Act. . ." and with the implementing regulations (J.S.App.6a). The court further noted that the refusal to comply with the administrative subpoena is an offense punishable by fine or imprisonment or both (J.S.App.6a). The district court relied upon *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978) in holding that the statutory scheme relied upon by the appellants is constitutionally impermissible in that there is no provision for having obtained a valid warrant prior to the attempted inspection (J.S.App.6a-8a). This Court in *Barlow's* held that the Fourth Amendment prohibits nonconsentual inspection of businesses, although probable cause in the criminal law sense is not required (J.S.App.7a). In rejecting the Secretary's argument, the district court noted that:

> "The reasoning of the Supreme Court in *Barlow's* applies with equal - if not greater - force in the instant situation" (J.S.App.8a).

After the order of the district court has been issued, the appellants filed a motion to alter or amend the judgment allowing the use of the administrative subpoena to take the records outside of the establishment which, in effect, disregarded the re-

peated attempts at entry upon the premises and attempted to change the issue which had been resolved in the district court (J.S.App.15a-17a). The court denied the motion (J.S.App.13a-14a).

SUMMARY OF ARGUMENT

It is beyond dispute that the inspection of documents on the premises of Lone Steer, Inc., under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without first having obtained a warrant is unconstitutional under the Fourth Amendment to the United States Constitution. The appellants' motion to alter or amend the judgment ignored the repeated attempts at entry. The motion only concerned an enforcement mechanism to be used when permission to enter the premises has not been granted. The appellant seeks to retain the right to use the statutory authority, which was, in effect, declared unconstitutional by the district court, as a basis for its authority to gain permission for entry.

This Court in *Marshall v Barlow's, Inc.* 436 U.S. 307 (1978) analyzed the entire statutory investigative scheme, including the enforcement mechanism, to determine constitutionality. The enforcement mechanism must be the functional equivalent of a warrant in order to be constitutional. The administrative subpoena, which is issued automatically by the Department of Labor to itself whenever permission to enter is refused, cannot be viewed as the functional equivalent of a warrant. There is no review by any independent magistrate. Not even the minimal level of probable cause, cited by the appellants in their brief, is required in order to obtain the administrative subpoena.

The appellant attempts to further dismember the facts of the case by centering on the fact that the administrative subpoena is directed to documents. In support of this contention it relies upon a series of cases

which were all decided long before this Court rendered its decision in *Barlow's*. Appellant contends that its cases, which were decided decades ago, were entirely unaffected by *Barlow's*. Additionally, appellant ignores the fact that this Court included documents within the scope of its holding in *Barlow's*. The use of the administrative subpoena was simply a last resort in a unified investigatory scheme to enter the premises of Lone Steer, Inc., in order to conduct its investigation.

ARGUMENT

IT IS BEYOND DISPUTE THAT THE WARRANT CLAUSE APPLIES TO THE UNRESTRICTED ENTRY AND INSPECTION PROVISIONS OF SECTION 11 OF THE FAIR LABOR STANDARDS ACT; THE INJUNCTION - FORBIDDING ENTRY AND INSPECTION - AND THE DECLARATORY JUDGMENT WERE PROPERLY GRANTED BY THE DISTRICT COURT.

Contrary to the Brief for the appellants, the judgment in the instant case resulted from repeated, persistent attempts by the appellants to gain entry, after permission to enter was specifically denied — not merely once, but twice. The stipulation shows that on January 12, 1982, Lone Steer, Inc.'s attorney informed the appellant that they did *not* have permission to enter the restaurant to inspect payroll records, in the absence of background information regarding the scope of the investigation (J.A.13).

On January 20, 1982, the Labor Department replied that it would enter the restaurant to inspect the records, that it would not supply the information, and that the restaurant would have to "prohibit" the inspection. In other words, Lone Steer, Inc., would have to bar entry. (J.A.14). In a telephone conference on January 28, 1982, Lone Steer Inc.'s attorney reiterated to the Department that permission to enter and inspect was denied (J.A.14-15).

Nevertheless, in an ostentatious display of authority, the compliance officer and a high ranking department official flown in from Denver, Colorado, entered the restaurant to attempt the inspection (J.A.15).

After the district court held that the Department's Section 11 authority to inspect employer records was subject to the Warrant Clause, it was astounding to see the Department's motion to alter or amend the judgment as follows:

The Secretary moves to alter or amend the judgment as follows (Proposed alterations or amendments are underlined):

> "This action came on for hearing before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,
>
> It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.
>
> *It is further Ordered and Adjudged that the Administrative Subpoena Duces Tecum, which requires the production, for inspection and copying by the Secretary of Labor, of records Lone Steer is required to maintain, at a location away from Lone Steer's premises, should be enforced. Lone Steer is directed to comply with the terms of said subpoena by producing*

such records at the place therein provided, on _____, 1982 at _____ o'clock _____m." (J.S. App.15a-17a).

The district court made clear in the judgment that the statutory scheme of the Fair Labor Standards Act, providing for entry and inspection of documents under Section 11, is subject to the Warrant Clause of the Fourth Amendment pursuant to the holding of *Marshall v. Barlow's, Inc.* 436 U.S. 307 (1978). The appellants appealed from the district court's denial of its motion to add enforcement of the subpoena as a constitutionally permissible enforcement device.

THE ADMINISTRATIVE SUBPOENA DUCES TECUM, AN ENFORCEMENT DEVICE OF SECTION 11 OF THE FAIR LABOR STANDARDS ACT – WHICH IS CLEARLY SUBJECT TO THE WARRANT CLAUSE – IS NOT THE FUNCTIONAL EQUIVALENT OF A WARRANT.

The Brief for the appellants separates the enforcement device, the subpoena, from the authority to inspect under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211). Indeed, without the inspection authority under Section 11, the appellants could not use the subpoena powers of the Federal Trade Commission Act through Section 9 of the Fair Labor Standards Act (29 U.S.C. §209).

This Court in *Barlow's* emphasized that the statutory investment scheme – inspection through enforcement – is examined to determine constitutionality. In *Barlow's*, as in the instant case, the statute authorized warrantless entry and inspection. The only difference is between the enforcement mechanisms. The administrative subpoena is an enforcement mechanism in the instant case. As this Court outlined in Barlow's, where the inspection provisions—such as Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) are subject to the Warrant Clause of the Fourth

Amendment, the enforcement mechanism may be examined to determine if it is "the functional equivalent of a warrant." 436 U.S. 307, 324, n.23. The administrative subpoena, a broad discovery device issued by the Department itself and enforced in Court without regard to any minimal level of "probable cause' can hardly be viewed as the functional equivalent of a warrant.

It is clear that Section 11 of the Fair Labor Standards Act (29 U.S.C. §211), which authorized warrantless entry into businesses for the purpose of inspecting records, is squarely within the holding of *Barlow's*. Section 9 of the Fair Labor Standards Act (29 U.S.C. §209) purports to augment the Secretary's Section 11 investigation authority providing him with subpoena power in aid of those investigations. Therefore, the concerns expressed by this Court in *Barlow's* apply to the entire investigatory scheme of this the Fair Labor Standards Act, including the compelled production of records under Section 9 of the Fair Labor Standards Act (29 U.S.C. §209).

The official inspection procedure used by the appellants reveal that the use of the administrative subpoena is inextricably intertwined with the entry process. The Wage and Hour Division's Field Operations Handbook §86b00 provides that compliance officers who encounter employer resistance to an inspection are to "explain" the provisions of Section 9 and 11 of the Fair Labor Standards Act (29 U.S.C. §209, §211) to the employer. If the employer persists in refusing an entry inspection, the compliance officer is instructed to report the matter to his or her supervisor, who will attempt to persuade the employer to allow the inspection. If a letter is sent to the employer, it "shall indicate the scope of the Division's investigatory powers as set out in FLSA Secs. 9 and 11(a), and shall request the employer to reconsider the refusal."

It is appellants' established policy to seek entry inspections by expressly relying on its inspection authority under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211). It is only after repeated attempts by the compliance officer and Area Director to schedule an entry inspection have failed, that the Division considers issuing an administrative subpoena. Handbook §86b00(d).

This procedure was followed in the present case. After the compliance officer demanded an entry inspection and encountered resistance, the appellant made several attempts to persuade Lone Steer, Inc.'s attorney "explaining" the scope of the appellant's investigatory powers. It was only after these attempts had failed that a subpoena was issued. In fact, the subpoena was not served until Lone Steer, Inc., filed its injunction action, and even at this point, the compliance officer was instructed to repeat his attempt to obtain entry before serving the subpoena.

The fact that documents are the object of the inspection does not limit the scope of the Constitutional protection. In *Barlow's* this Court specifically included documents in its holding (436 U.S. 324, n.22).

This Court in *Barlow's* was primarily concerned with the method used by an administrative agency to select the targets of its investigation. It was the unbridled and unreviewed discretion of the field officer that the court found especially objectionable in his regard. It is clear from the facts as stipulated in this case and the provisions of the Fair Labor Standards Act (29 U.S.C. Section 201 et.seq.) that the field officer is given just such unbridled discretion in selecting the targets of his investigation.

If the district courts are permitted to enforce administrative subpoenas issued in aid of an investigation pursuant to Section 11 of the Fair Labor Standards Act (29 U.S.C. §211), the Fourth Amendment concerns expressed by this court in *Barlow's* will

be bypassed by the unlimited use of administrative subpoenas. Additionally, the appellant will still be able to obtain permission for entry prior to having to resort to an administrative subpoena by claiming authority under the provisions which were held unconstitutional by the district court in this case. The resort to the use of an administrative subpoena as part of a unified investigatory scheme is simply an attempt to enter the same location through a back door.

In *Barlow's*, the Secretary of Labor contended, as he contends in the instant case, that documents may be inspected without a warrant. Just as this Court rejected the Secretary of Labor's contention in *Barlow's*, it should reject the contention again.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully Submitted,

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:
JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates

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No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bell v. *Wolfish*, 441 U.S. 520 4

Camara v. *Municipal Court*, 387 U.S. 523 10

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 10

Donovan v. *Union Packing Co.*, 714 F.2d 838 ..... 4, 6, 7, 8

Knetsch v. *United States*, 364 U.S. 361 4

Marshall v. *Barlow's, Inc.*, 436 U.S. 307 ..... 4, 5, 6, 7, 8, 10

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 ..... 3, 5, 6

Schneckloth v. *Bustamonte*, 412 U.S. 218 ..... 10, 12

United States v. *Mississippi Power & Light Co.*, 638 F.2d 899, cert. denied, 454 U.S. 982 ..... 6, 7

United States v. *Morton Salt Co.*, 338 U.S. 632 6

Constitution, statutes and regulations:

U.S. Const. Amend. IV 5, 7

Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.* :

§ 9, 29 U.S.C. 209 11

§ 11, 29 U.S.C. 211 ..... 8, 10, 11, 12

Page

Constitution, statutes and regulations—Continued:

28 U.S.C. 1252 4

41 C.F.R. 60-1.43 6

Exec. Order. No. 11,246, 30 Fed. Reg. 12319 (1965) 6

Miscellaneous:

Wage-Hour Division, Employment Standards Administration, U.S. Dept. of Labor, *Field Operations Handbook*:

1971 10

1975 ..... 10, 12

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1. The facts in this case have been stipulated, but in light of certain mischaracterizations of those facts made by appellee, it seems appropriate to recount them briefly. Appellee asserts (Br. 6, 8, 12) that government inspectors made "repeated attempts" to enter its premises to conduct an inspection after permission to enter was "repeatedly denied." See also Brief for the National Restaurant Association (NRA) as Amicus Curiae 18 n.6. This assertion is patently false, as is made clear by the stipulated facts (J.A. 11-17) and, indeed, by appellee's own account of the facts (Br. 2-4). This case does not involve *any* attempt to enter private property without consent for the purpose of making a regulatory inspection.

Beginning on January 6, 1982, a Department of Labor compliance officer twice attempted — once by phone and once by letter — to schedule an inspection of appellee's

business (J.A. 12-13). Before the rescheduled inspection occurred,[1] appellee's counsel wrote to the government on January 12, 1982, stating that permission to conduct the investigation would be withheld until the government explained either the reason for the investigation or its scope (J.A. 13). On January 20, 1982, the government responded with a letter from Loren Gilbert outlining the general scope of an FLSA investigation but declining to give the reason for the selection of appellee for inspection. The letter stated that the inspection would be rescheduled for February 2, 1982, and inquired whether appellee still intended to prohibit the inspection, in which case the Department of Labor would request an administrative subpoena. J.A. 14. On January 28, 1982, appellee's counsel telephoned Gilbert to state that permission to conduct the inspection would be denied and that the government would have to obtain a warrant from a magistrate (J.A. 14). This was the first time that appellee stated that it would refuse to consent to the inspection under any circumstances. On February 2, 1982, the compliance officer appeared as scheduled at appellee's premises. This was his first and only visit. After waiting fruitlessly in the lobby area for 20-30 minutes for appellee's manager to appear, the compliance officer served another of appellee's employees with a subpoena duces tecum and departed. J.A. 15. Thus, the "repeated attempts" to enter the premises consisted of one scheduled visit to appellee's lobby to serve a subpoena.

Appellee and amicus NRA also pointedly note that the subpoena was not served until after appellee commenced its suit for an injunction, thus suggesting that the government

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[1] Appellee's manager called late in the day on January 6 to report that the first scheduled date was not convenient. The compliance officer then wrote appellee a letter rescheduling the inspection and stating that appellee should contact him to work out some other arrangement if that date also proved to be inconvenient. J.A. 12-13.

resorted to a subpoena only when faced with litigation over its right to conduct an inspection. See Appellee Br. 12; NRA Br. 12, 19. This suggestion is preposterous. The January 20 letter from the government to appellee clearly stated that the inspection would be rescheduled for February 2, and that an administrative subpoena would be requested if appellee declined to consent to the inspection (J.A. 14).[2] On January 28, appellee informed the government that it would not consent to the inspection (J.A. 14), and the subpoena was issued on that date (J.A. 16). Armed with the knowledge that it could expect to be served with a subpoena on February 2, appellee filed its complaint for injunctive relief on February 1, 1982. This scenario hardly suggests that the government resorted to a subpoena as an afterthought once its inspection authority had been challenged in court.

2. As explained in our op ning brief (Br. 10-14), this Court already has upheld the consititutionality of the subpoena provisions of the Fair Labor Standards Act (FLSA) in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), and that case and its progeny clearly compel rejection of appellee's contention that a warrant is required for the inspection of specified documents.[3] Appellee does

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[2]NRA states (Br. 19 n.7) that this letter's reference to a potential subpoena request was "quite vague." This assertion does not give much credit to the deductive powers of the recipient, but, in any event, another government communication to appellee left no doubt whatsoever about the matter. On January 21, 1982, Associate Regional Solicitor Henry C. Mahlman wrote a letter to appellee's counsel in which he stated, inter alia: "Should your client elect not to permit the investigation, I understand you have been informed we would seek an administrative subpoena duces tecum." No. A1-82-24 Appellants' Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, Exh. D, Attachment 3.

[3]Even one of the amici curiae supporting appellee concedes that the administrative subpoena duces tecum is a valid investigative device. Brief of the Washington Legal Foundation as Amicus Curiae, 13-14. Indeed, none of three amici supporting appellee actually supports its

not see fit to discuss these cases; its only comment is that they "were decided decades ago" (Br. 8). This has not heretofore been recognized as a reason for failing to follow binding precedent. In our opening brief (Br. 15-17), we also explained why there is no merit to appellee's contention (Br. 10-11, 12-13) that *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), requires an agency to obtain a warrant, not a subpoena, whenever it desires to inspect documents. Subsequent to the filing of our opening brief, the Eighth Circuit rendered a decision unequivocally rejecting, in the context of an OSHA subpoena, the contention that *Barlow's* prohibits an agency from obtaining any documents by subpoena without a warrant. *Donovan* v. *Union Packing Co.*, 714 F.2d 838 (1983). Thus, were it not for the direct appeal provision of 28 U.S.C. 1252, it is clear that the district court's decision would be subject to summary reversal by the Eighth Circuit.

3. Amicus Equal Employment Advisory Council (EEAC) raises a contention not made in the court below. It asserts (Br. 9-25) that a subpoena duces tecum is invalid unless the government demonstrates the reasonableness of its selection of the recipient of the subpoena. EEAC therefore urges this Court to remand this case to the district court to inquire into the reason why appellee was chosen for investigation.

Even if this argument were raised by appellee, rather than by an amicus curiae,[4] it would be inappropriate for the Court to consider the contention because it goes beyond the scope of the issues presented in the complaint. Appellee's complaint asserts that the Constitution requires a warrant

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position that the subpoena duces tecum is no longer a valid administrative investigative device and that the Secretary of Labor should be required to obtain a warrant in order to examine relevant documents.

[4]See *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).

to inspect documents and bars resort to an administrative subpoena duces tecum. If upheld, this contention would require the district court to quash or refuse to enforce the subpoena, which is in fact what the court did. If EEAC's contention were upheld, however, there would be no need to quash the subpoena; rather, the remedy would be to require the government to explain in the subpoena enforcement action the reason appellee was selected for investigation. Thus, EEAC seeks relief that was not sought in the complaint.

b. In any event, EEAC's contention is wholly without merit. EEAC concedes, for purposes of its argument, that the Fourth Amendment does not require the use of a warrant to examine business records (Br. 9, 21). EEAC argues instead (Br. 21) that, if the Secretary desires to resort to a subpoena, *Barlow's* requires him "to show that his investigatory target was chosen on the basis of specific, neutral criteria." This contention basically seeks to engraft the administrative probable cause requirement that attaches to a request for a search warrant onto the subpoena power. Nothing in *Barlow's* requires such a result, which is totally inconsistent with *Oklahoma Press* and its progeny.

In *Barlow's*, the Court simply applied the longstanding rule that "warrantless searches are generally unreasonable" (436 U.S. at 312), and concluded that there were not sufficient grounds in the context of OSHA inspections to justify an exception to that rule. Given its holding that a warrant was required, the Court went on to consider the substantive standard that had to be met to obtain a warrant, *i.e.*, what was the content in this context of the "probable cause" requirement of the Warrant Clause. It concluded that the "probable cause" requirement could be satisfied by certain showings, including a showing that the inspection was being made pursuant to a general administrative plan based on specific neutral criteria. 436 U.S. at 320-321, 323.

When *Barlow's* was decided, it was also a longstanding rule that an administrative subpoena duces tecum is not an "actual search" and that such a subpoena is not subject to the requirements of the Warrant Clause. Rather, it was well settled that the validity of a subpoena is assessed under a reasonableness standard making certain specific inquiries into, for example, the relevance and burdensomeness of the document request. See generally Appellants Br. 11-14; *United States* v. *Morton Salt Co.*, 338 U.S 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling, supra. Barlow's* did not suggest any modification of this well settled rule. The concept of "specific, neutral criteria" that EEAC seeks to engraft onto the subpoena power (see EEAC Br. 14-15) was specified in *Barlow's* as an element of the "probable cause" needed to obtain a warrant. There is no reason to suppose that the Court in *Barlow's* intended it to apply to a subpoena duces tecum, where there is no warrant and, the Court has unequivocally held, no probable cause requirement. Put another way, *Barlow's* involved a "search"; there is no reason to transfer the probable cause standard required for a search to the subpoena context, where there is no search and where the standards for assessing the validity of a subpoena are already well established.

EEAC relies for support principally on language in two court of appeals decisions, *Donovan* v. *Union Packing Co., supra*, and *United States* v. *Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir.), cert. denied, 454 U S. 892 (1981). EEAC Br. 10, 12, 14-16, 22-25. Neither case provides any support for its position.

Mississippi Power & Light Co. did not involve an administrative subpoena duces tecum, but rather a broad, on-site inspection of documents (see 41 C.F.R. 60-1.43) as part of an investigation to determine compliance with Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965). The government brought suit for injunctive relief to enable it to conduct the

inspection. See 638 F.2d at 902. The court of appeals held that the inspection would satisfy the Fourth Amendment if it were shown, inter alia, that the search was pursuant to " 'an administrative plan containing specific neutral criteria' " (638 F.2d at 907 (quoting *Barlow's*, 436 U.S. at 323)). This decision therefore adds nothing to *Barlow's*, and EEAC's heavy reliance on it is mystifying. It was assumed by the court that the inspection was an administrative "search" and therefore subject to the constraints imposed in *Barlow's*.[5] The court never considered the possibility that the proposed inspection could be analogized to a subpoena duces tecum, rather than a search, and its opinion has no application to subpoenas.

Moreover, *Mississippi Power & Light Co.* is plainly distinguishable on its facts. The inspection at issue there, even though it focused primarily on documents, bears little resemblance to the subpoena duces tecum involved here. As explained in our opening brief (Br. 17 n.9), there is an important difference between an entry onto premises to conduct a broad inspection of documents and a subpoena requiring the production of certain specified documents off premises. A subpoena involves no entry, and it allows the subpoenaed company itself to search through its files to find those documents that are specified by the subpoena as relevant.

The decision in *Union Packing* also is completely inapposite. As noted above, that case flatly rejected the argument that *Barlow's* requires the issuance of a warrant to inspect documents in circumstances not involving an entry onto private premises. In the course of discussing the case, the

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[5]The court of appeals found that a formal warrant was unnecessary because the regulatory requirement that a court order be obtained before conducting a nonconsensual inspection was the "equivalent" of a warrant (638 F.2d at 907; see *Barlow's*, 436 U.S. at 325).

court noted that Union Packing's records were sought "based on the neutral criteria that the company was a member of a high hazard industry" (714 F.2d at 842).[6] This statement in no way suggests, however, that an otherwise lawful subpoena could not be enforced if it were not based on such neutral criteria. To the contrary, the court of appeals concluded its analysis by applying the traditional standards for assessing the validity of a subpoena (*ibid.* (citation omitted)):

> The demand for documents is specific, the records sought are primarily those the company is required to keep and make available under the statute, and the documents are necessary to a calculation of the company's lost workday injury rate.

Indeed, the court noted that if additional hurdles were placed in the way of the subpoena power, as EEAC suggests, the Secretary would be unable to obtain preliminary information without which "it would be difficult for the Secretary to develop a pian with neutral criteria which could be used to select a workplace for inspection" (*id.* at 841).[7]

4. Amicus NRA raises several extraneous issues. First, it contends (Br. 14-17) that the authority conferred upon the Secretary by Section 11 of the FLSA (29 U.S.C. 211) to

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[6]These criteria, of course, were developed by OSHA in light of *Barlow's* to justify the "actual searches" that OSHA inspections entail.

[7]EEAC also asserts (Br. 24) that it is impossible to assess whether the subpoena is "properly limited in scope" without knowing the reason appellee was selected for inspection. This assertion is quite mistaken. The reasonableness of the subpoena turns on the connection between the documents sought and the purpose of the investigation. Here, as we noted in our opening brief (Br. 14), the subpoenaed documents were plainly relevant to the purpose of the inquiry — determining whether appellee was complying with FLSA requirements. The reason for selecting appellee for inspection is totally irrelevant to this inquiry.

enter premises for the purposes of conducting an inspection in unconstitutional. See also Brief of the Washington Legal Foundation as Amicus Curiae. As explained in our opening brief (Br. 19 n.11), the issue of the facial validity of Section 11 is not presented here because the government did not attempt a nonconsensual entry of appellee's premises; this litigation has focused on the government's insistence that appellee produce specified documents for inspection off premises pursuant to a subpoena duces tecum. The government clearly stated in the district court that "compliance officers are instructed not to enter any non-public area of any establishment without the employer's permission," and it did not endeavor to justify any right to make such nonconsensual entries. No. A1-82-24 Memorandum in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 13; see also Appellants' Motion for Summary Judgment and Memorandum of Law in Support Thereof 14-16.[8] In short, the issue in this case is the constitutionality of a subpoena duces tecum, not an imaginary forced entry.[9]

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[8]In fact, the Secretary of Labor does not have a policy of making nonconsensual entries onto private premises to conduct FLSA investigations, and there is no reason to expect that the Secretary will adopt such a policy in the future.

[9]This is reflected in appellee's filings as well. NRA places great reliance on appellee's prayer for declaratory relief (see Br. 8, 19 n.8, 21 n.9), but that was narrowly focused on the validity of executing a subpoena off premises. The complaint requested "[t]hat a Declaratory Judgment be granted declaring that the Fair Labor Standards Act is unconstitutional insofar as it purports to authorize a warrantless inspection of records *by way of administrative Subpoena after entry to inspect has been denied*" (J.A. 22 (emphasis added)). The prayer for injunctive relief did seek an injunction against "entering [appellee's] premises" or "seizing any of [its] property with an administrative Subpoena" (J.A. 22), but, as noted above, the government's response made clear that it had no wish to enter the premises without permission.

NRA also asserts (Br. 20-22) that the Secretary's standard operating procedure for conducting FLSA investigations "constitutes a deliberate pattern of deprivation of Fourth Amendment rights" (Br. 21 (footnote omitted)). The exact thrust of this accusation is somewhat unclear, but it seems at least partly directed at the Secretary's policy of attempting to make a consensual entry before resorting to a subpoena duces tecum. But this procedure surely is unobjectionable. It is clear that Section 11 of the FLSA authorizes the Secretary to "enter and inspect" an employer's place of business with its consent (*Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 364 (1942)), and such a consent search is, of course, constitutionally permissible (see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973)). This Court has specifically recognized the appropriateness of consensual investigations where an administrative warrant would otherwise be required for entry. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 316 (noting that a warrant requirement probably would not impose serious burdens on the government or the courts because most employers can be expected to consent to inspection without a warrant); *Camara* v. *Municipal Court*, 387 U.S. 523, 539 (1967) ("most citizens allow inspections of their property without a warrant" and therefore "warrants should normally be sought only after entry is refused").

The Secretary of Labor likewise has recognized that it is advisable first to seek an employer's consent to a Wage-Hour investigation. Such a consensual inspection is often more convenient for both the government and the employer. The Department's practice in this regard is reflected in the excerpts of the Wage-Hour *Field Operations Handbook* cited by NRA (Br. 6, 21-22). The procedure set forth in the Handbook in effect at the time of this investigation[10]

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[10]In October 1982, certain revisions were made to Chapter 86b of the Handbook, but they have no bearing on the discussion here.

instructed Wage-Hour officials first to ask an employer's permission to conduct an investigation before resorting to a subpoena. It is clear, however, that "compliance officers are not permitted to enter any non-public area of any establishment without the employer's consent." Affidavit of Loren Gilbert, Assistant Regional Administrator for Wage-Hour, No. A1-82-24 Appellants' Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, Exh. C. If permission to enter is refused, a subpoena seeking the relevant documents may be issued by the Wage-Hour Administrator. Wage-Hour Division, Employment Standards Administration, U.S. Dept. of Labor, *Field Operations Handbook*, ch. 52, § 52a05 (1971); *id.* at ch. 86, §§ 86b00, 86b01 (1975).

NRA principally objects to the Secretary's policy of contacting employers who decline to consent to an inspection and apprising them of the Secretary's investigative powers and responsibilities set forth in Sections 9 and 11 of the FLSA (29 U.S.C. 209 and 211) before requesting a subpoena (Br. 20-22). NRA characterizes this policy as one designed to obtain "coerced consents" that ought not to be considered valid (Br. 22-24). Of course, there is no issue here of coerced or invalid consent because no consent was given in this case, but it is nevertheless appropriate to respond more broadly that there is nothing improper in the Secretary's standard operating procedure. NRA places a sinister cast upon the procedure by misleadingly stating that the compliance officer is instructed "to specifically direct the employer's attention to the warrantless entry and inspection provision of FLSA Section 11(a)" (Br. 21 (footnote omitted)). But there is no singling out of the few words of the statute that authorize inspection entries; the policy is to apprise the employer of *all* of the provisions of Section 11 and Section 9. It is difficult to see what is inappropriate

about showing the employer the text of the relevant statute. It has the salutary effect of, inter alia, assuring the employer that the government is indeed authorized to investigate wages and hours, informing it of the scope of that investigative responsibility, and apprising it that the government is empowered to request a subpoena to obtain documents if the employer declines to permit the inspection. This policy has the effect of informing the employer's decision whether to consent to an inspection, not of exerting a coercive influence upon it.

The accusation that there exists a government policy of coercing consents to FLSA inspections is belied, not confirmed, by the facts of this case. Obviously, appellee did not feel any compulsion to consent to an inspection Appellee initially declined to allow the inspection when it was first scheduled and subsequently communicated its intention to refuse consent under any conditions. The government did not attempt to enter by force or threat; it acceded to appellee's refusal. The government action singled out as "coercive" by NRA (Br. 22, 24) is Loren Gilbert's January 20 letter outlining the general scope of an FLSA investigation and referring to the Secretary's authority under Section 11 of the FLSA. That "coercive" letter concluded by *asking* appellee to notify the government whether it would permit the inspection (J.A. 14).[11] In sum, the FLSA investigation of appellee at all times has been conducted in a manner that is beyond reproach.

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[11]Of course, a consent may be valid even without such notification of a right to refuse consent. See *Schneckloth* v. *Bustamonte*, 412 U.S. at 231, 234. Nevertheless, Gilbert inquired whether appellee would voluntarily permit the inspection, and that inquiry reflects standard procedure. See *Field Operations Handbook, supra*, ch. 86, § 86b00(c).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE
Solicitor General

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Appellee.

On Appeal from the United States District Court for the District of North Dakota

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLEE

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
STEPHEN C. YOHAY
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE SUBSTANTIVE REQUIREMENTS OF *BARLOW'S* SHOULD BE APPLIED TO THE FLSA SUBPOENA PROCEDURE	9
A. Even if an Administrative Subpoena Enforcement Procedure Provides Procedural Safeguards Equivalent to a Warrant, the Subpoena Nevertheless Cannot Be Enforced Unless the Investigating Agency Satisfies the *Barlow's* Standards	9
B. Under *Barlow's*, an Agency Does Not Have the Authority to Request Employer Records Unless it Can Establish that the Employer Was Selected for Inspection Pursuant to an Administrative Plan Containing Specific, Neutral Criteria	10
C. The FLSA Enforcement Scheme Presents the Precise Evils of "Unbridled" Administrative Discretion Which the *Barlow's* Requirements Are Intended to Curb	16
II. THE GOVERNMENT'S ARGUMENT THAT AN AGENCY MAY INSPECT ANY DOCUMENTS RELATED TO A STATUTORY ENFORCEMENT SCHEME FAILS TO CONSIDER DIRECTLY CONTRARY LANGUAGE IN *BARLOW'S* AND MISCONSTRUES OTHER CASE AUTHORITY	19

TABLE OF CONTENTS—Continued

Page

III. EVEN IF A WARRANT IS NOT REQUIRED, THE GOVERNMENT'S INSPECTION CANNOT PROCEED WITHOUT A REMAND TO THE DISTRICT COURT FOR A DETERMINATION ON THE REASONABLENESS OF THE SUBPOENA 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases	Page
Camara v. Municipal Court, 387 U.S. 523 (1967)	18
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	3
Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)	18
County of Washington v. Gunther, 452 U.S. 161 (1981)	3
Donovan v. Dewey, 452 U.S. 594 (1981)	10, 11, 21
Donovan v. Mehlenbacher, 652 F.2d 228 (2d Cir. 1981)	24
Donovan v. Shaw, 668 F.2d 985 (8th Cir. 1982)	23
Donovan v. Union Packing Co. of Omaha, —— F.2d ——, 11 BNA OSHC 1648 (8th Cir. 1983)	7, 14, 15, 25
EEOC v. Associated Dry Goods, 449 U.S. 590 (1981)	3
EEOC v. Bay Shipbuilding Corp., 668 F.2d 304 (7th Cir. 1981)	23
EEOC v. Shell Oil Co., 676 F.2d 322 (8th Cir. 1982), *pet. for cert. granted*, No. 82-825	3, 18
First Alabama Bank of Montgomery v. Donovan, 692 F.2d 714 (5th Cir. 1982)	22
In Re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979)	23
In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co., —— F. Supp. ——, 5 BNA OSHC 1375 (N.D. Ill. 1977), *aff'd* 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979)	15
In the Matter of Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978)	15
Lorillard v. Pons, 434 U.S. 98 (1977)	3
Marshall v. Barlow's Inc., 436 U.S. 307 (1978)	*passim*
Marshall v. Stevens People & Friends for Freedom, 669 F.2d 171 (4th Cir.), *cert. dismissed*, 455 U.S. 930 (1982)	23
Marshall v. Walbridge, 84 Lab. Cas. (CCH) para. 33,723 (N.D. Ind. 1978)	23
Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 (1946)	19, 20, 21

TABLE OF AUTHORITIES—Continued

Page

United States v. Mississippi Power & Light Co., 638 F.2d 907 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 ..... 6, 10, 12, 18, 22, 24
United States v. Morton Salt Co., 338 U.S. 632 (1950) 20, 21, 22
Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979) 15

Statutes and Regulations:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, *et seq.* (1980) 18
The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(a) (1976 & Supp. V 1982) 2, 17, 18, 19
The Equal Pay Act, 29 U.S.C. § 206 ..... 2, 17, 18, 19
The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1976 & Supp. V 1982):
Section 9, 29 U.S.C. § 209 ..... *passim*
Section 11(a), 29 U.S.C. § 211(a) ..... *passim*
The Occupational Safety and Health Act of 1970, 29 U.S.C. § 657 (1976 & Supp. V 1982):
Section 8(a), 29 U.S.C. § 657(a) 6, 10, 11, 16
Section 8(b), 29 U.S.C. § 657(b) 7, 11, 14
Section 8(c), 29 U.S.C. § 657(c) 12
29 C.F.R. § 516.7(b) (1982) 17
29 C.F.R. § 1601.12(a)(3) 19
29 C.F.R. § 1620.19 (1982) 17
29 C.F.R. § 1626.15 (1982) 17
29 C.F.R. § 1910.20 (1982) 12

Other Authorities:

Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1684

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants,

v.

LONE STEER, INC.,
Appellee.

On Appeal from the United States District Court for the District of North Dakota

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLEE

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of all parties, and in support of the Appellee, Lone Steer, Inc. Their consents have been filed with the Court Clerk.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, in-

cluding both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of the Equal Employment Advisory Council are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the Fair Labor Standards Act (29 U.S.C. § 211, et seq.) ("FLSA"). They are also subject to the Equal Pay Act (29 U.S.C. § 206), and the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.) ("ADEA"). Sections 11(a) and 9 of FLSA, the statutory provisions here in question, govern not only FLSA investigations, but also investigations under the Equal Pay Act and the ADEA.[1] Thus, EEAC's members have a direct interest in the issue presented for the Court's consideration in this case, i.e., whether

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[1] The Equal Pay Act amended FLSA. ADEA incorporates Sections 11(a) and 9 of FLSA by reference. 29 U.S.C. § 626(a). This point is not mentioned by the Government either in its brief in this case or in its Jurisdictional Statement. Appellant Secretary of Labor administers and enforces FLSA. Pursuant to President Carter's Reorganization Plan of 1978, responsibility for Equal Pay Act and ADEA administration and enforcement, formerly vested in the Secretary, was transferred to the Equal Employment Opportunity Commission ("EEOC"). Reorganization Plan 1 of 1978, 43 F.R. 19807 (1978).

the statutory investigation scheme established by the Secretary under FLSA violates the Fourth Amendment.

Because of its interest in such issues, EEAC has participated in numerous other cases in this Court involving substantive and procedural issues under legislation governing equal employment opportunity. See, e.g., *County of Washington v. Gunther*, 452 U.S. 161 (1981) (Title VII and Equal Pay Act); *Lorillard v. Pons*, 434 U.S. 98 (1977) (ADEA); *EEOC v. Shell Oil Company*, No. 82-825 (Requirements for Title VII Commissioner's charge); *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981) (EEOC disclosure regulations); and *Chrysler Corp v. Brown*, 441 U.S. 281 (1979) (OFCCP policy on disclosure of business information).

STATEMENT OF THE CASE

On January 6, 1982,[2] Al Godes, a compliance officer of the Secretary's Wage and Hour Division, telephoned the Lone Steer motel and restaurant in Steele, North Dakota, and informed its manager that he would commence a wage and hour investigation the next morning. Godes told the manager to have available the wage and payroll records for all employees for the past two years. Thereafter, on January 12, Lone Steer's counsel wrote Godes, stating that permission to conduct the investigation would be denied until Godes revealed whether the investigation was prompted by a specific complaint. If not, and if a general wage and hour investigation was planned, Godes was asked to state the scope of the investigation.

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[2] All dates are in 1982 unless otherwise indicated.

On January 20, appellant Loren E. Gilbert, the Secretary's Regional Wage and Hour Administrator in Denver, Colorado responded in a letter to appellee's counsel. Gilbert's letter stated, *inter alia*,

> Under Section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, *the motive for the investigation will not be given* . . .
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.
>
> I have instructed Mr. Godes to initiate *this investigation* on Tuesday, February 2, 1982 at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making *this investigation* at that time, please let me know so that I can request an *administrative subpoena in order to conduct the investigation.* (Emphasis added).

Upon receiving the letter, Lone Steer's counsel telephoned Gilbert and advised him that Godes would be denied permission to conduct the investigation. Nevertheless, on February 2, Godes and another investigator entered the Lone Steer establishment and attempted to conduct the investigation. When they were denied permission, Godes served an administrative subpoena duces tecum on Lone Steer. The administrative subpoena was issued in Washington, D.C. on January 28, over the signature of the Administrator of the Secretary's Wage and Hour Division, William Otter.

On February 8, Lone Steer's counsel telephoned the Secretary's Regional Counsel in Denver, Colorado and stated that Lone Steer would not acknowledge and comply with the administrative subpoena. This message was confirmed in a letter of February 10.

The subpoena requested that an officer, agent or employee having custody and personal knowledge of Lone Steer's records appear to testify regarding Lone Steer's wage practices and to produce certain records at the Secretary's Wage-Hour office in Bismarck, North Dakota. The records requested were among those which employers are required to keep under FLSA.

Lone Steer challenged the constitutional validity of the investigation by commencing this action against the Secretary, Godes and Gilbert in the United States District Court for the District of North Dakota. In its amended complaint, Lone Steer sought to enjoin the Secretary and his agents from "entering [Lone Steer's] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant." Lone Steer also sought a declaratory judgment that FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative subpoena after entry to inspect has been denied." The Secretary petitioned the court to compel Lone Steer to comply with the subpoena.

On stipulated facts and cross-motions for summary judgment, the district court determined that this Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) applies to investigations under Section 11 of FLSA. The district court held, therefore,

> that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc. for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant.

Thereafter, the Secretary moved the district court to modify or amend its order so as to enforce the Secretary's administrative subpoena. The district court denied the Secretary's motion without explanation.

SUMMARY OF ARGUMENT

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), this Court found that the Constitution curbs the Secretary's "unbridled discretion" to select employers for investigation under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), by requiring the Secretary to obtain a warrant to inspect nonconsenting employers. The Court held that to obtain a warrant, the Secretary must show that the employer was selected based on a legislative or administrative plan, premised on specific, neutral criteria. The Court also rejected the contention that in conducting an OSHA investigation, the Secretary may obtain access to all records and documents which the employer is required to maintain under OSHA. The Court emphasized that under the Fourth Amendment, it is important to delineate the scope of a request, especially where documents are involved.

Lower courts have construed *Barlow's* to modify the traditional criteria of reasonableness under the Fourth Amendment. Thus, an investigation under Executive Order 11246, although found to be for a lawful purpose and properly limited in scope, was not allowed absent proof that the business had been selected on the basis of specific, neutral criteria. *United*

States v. Mississippi Power & Light Co., 638 F.2d 907 (5th Cir. 1981), *cert. denied*, 454 U.S. 892. Also, a subpoena duces tecum sought by the Secretary under OSHA Section 8(b) was enforced only upon a showing that the employer had been chosen on the basis of a neutral plan, and that the subpoena was narrowly limited in scope. *Donovan v. Union Packing Co. of Omaha*, —— F.2d ——, 11 BNA OSHC 1648 (8th Cir. 1983) (not officially reported).

The rationale of *Barlow's* logically requires that these same safeguards be applied to the subpoena procedure established by Sections 11(a) and 9 of FLSA, because this enforcement scheme contains virtually no privacy guarantees for the business owner. The statute, the Secretary's regulations, and the Secretary's enforcement practices in this case show that the Secretary has no plan for determining which businesses to investigate, and that the business owner has no notice of when such investigations are likely to occur. Accordingly, this Court should make clear that when a district court is requested by the Secretary to enforce an FLSA subpoena, the Secretary must show that the subpoena not only is authorized by statute and is properly limited in scope, but also that the target of the subpoena was chosen on the basis of specific, neutral criteria, as articulated in *Barlow's*. The same showing logically would be required for subpoenas issued under the Equal Pay Act and Age Discrimination in Employment Act, since both of those statutes incorporate the investigatory scheme of FLSA Section 11(a) and 9.

The established authorities confirming the validity of the Secretary's subpoena power under FLSA require no different result. As the lower courts' deci-

sions subsequent to *Barlow's* have demonstrated, the traditional tests of Fourth Amendment reasonableness laid down by those authorities still apply. They are amplified, however, by the Court's analysis in *Barlow's*.

Applying the pertinent test of reasonableness to the instant case, it is not clear from the instant record why the appellee was selected as an investigatory target; indeed, the agency specifically declined to give its reasons for investigating the appellee. It thus cannot be clear whether the scope of the subpoena is limited to that which is relevant to the purpose of the investigation. Even if a warrant is not required, the Court, nevertheless, should not merely permit the investigation to proceed. Rather, it should remand the case to the district court with instructions to apply the substantive requirements of *Barlow's*. The district court would then inquire whether the appellee was selected for investigation pursuant to valid, neutral criteria, and into whether the scope of the subpoena is limited to documents relevant to the reason appellee was chosen. If the agency cannot satisfy these requirements, the investigation cannot go forward.

ARGUMENT

I. THE SUBSTANTIVE REQUIREMENTS OF *BARLOW'S* SHOULD BE APPLIED TO THE FLSA SUBPOENA PROCEDURE

A. Even if an Administrative Subpoena Enforcement Procedure Provides Procedural Safeguards Equivalent to a Warrant, the Subpoena Nevertheless Cannot Be Enforced Unless the Investigating Agency Satisfies the *Barlow's* Standards.

The Government would confine the Court's consideration of the applicability of *Marshall v. Barlow's Inc.* in this case to the question of whether a warrant is required as a precondition to a subpoena under the FLSA. That question is addressed by the appellee in its brief. EEAC's concern as *amicus curiae*, however, is that apart from the issue of a search warrant, business owners are entitled to assurance through the subpoena process that they will be selected for wage and hour, equal pay and age discrimination investigations on the basis of specific, neutral criteria and that the scope of administrative subpoenas issued in such investigations will be limited strictly to achieving legitimate purposes.

As *Barlow's* indicated, "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 324 n.22. This Court also specifically rejected the government's position that the *Barlow's* standards should not be applied to records which were within the government's statutory power to review, or which were required to be kept pursuant to agency regulations. The government's brief provides no compelling reason why those standards should not be applied to FLSA investigations which, as shown below (Section C), are pursuant to statutory investigatory authorization

that is even broader than that permitted by the OSHA construed in *Barlow's*.

Moreover, it is beside the point for the government to argue that the subpoena enforcement procedure provides safeguards that are the equivalent of a *Barlow's* search warrant procedure. As the Fifth Circuit has indicated, even if the administrative procedure provides such equivalent safeguards, the agency nevertheless must establish in such proceedings that the employer was selected by the use of specific neutral criteria. See *United States v. Mississippi Power & Light Company, supra*, 638 F.2d at 907-08 (". . . these three [*Barlow's*] elements are essential" to a request for documents under Executive Order 11246).

As shown below, the concerns expressed by the Court in *Barlow's*, and the standards established to satisfy those concerns, are directly applicable to subpoena enforcement proceedings conducted pursuant to Sections 11 and 9 of the FLSA.

B. Under *Barlow's*, an Agency Does Not Have the Authority to Request Employer Records Unless it Can Establish that the Employer Was Selected for Inspection Pursuant to an Administrative Plan Containing Specific, Neutral Criteria.

In *Barlow's*, this Court held that absent consent, a warrant is constitutionally required in order to conduct an administrative inspection under Section 8(a) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 657(a). The Court found that OSHA "fails to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute." *Donovan v. Dewey*, 452 U.S. 594, 601 (1981). Instead, Section

8(a) of OSHA purports to authorize inspections "of any . . . establishment . . . where work is performed by an employee of an employer," and purports to authorize investigators to search "any such place of employment and all pertinent conditions . . ., and to question privately any such employer, owner . . . or employee." 29 U.S.C. § 657(a). Additionally, the statute was found to contain no "standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search." *Id.*

Upon evaluating this statutory scheme, the Court determined that the provision authorizing warrantless inspections "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Barlow's, supra*, 436 U.S. at 323. The Court thus concluded that a warrant is required by the Fourth Amendment "to assure a nonconsenting owner, who may have little real expectation that his business will be subject to inspection, that the contemplated search was 'authorized by statute, and . . . pursuant to an administrative plan containing specific neutral criteria.'" *Donovan v. Dewey, supra*, 452 U.S. at 601, quoting *Barlow's, supra*, 436 U.S. at 323.

Additionally, although the Secretary's power to issue a subpoena for records under OSHA Section 8(b), 29 U.S.C. § 657(b) was not directly in issue, the Court specifically addressed the Secretary's claim that he is entitled to perform a broad search of an employer's records when performing an investigation under Section 8(a). The Secretary had asserted that he may inspect without a warrant all records which an employer is required to keep under the OSHA stat-

ute, or under regulations which the Secretary has promulgated.[3] As previously noted, the Court expressly rejected this argument, stating that "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 323 n.22.

The Court's ultimate conclusion in *Barlow's* was that the OSHA statute "is unconstitutional insofar as it purports to authorize inspections without a *warrant or its equivalent. . . .*" 436 U.S. at 324. (Emphasis added). Subsequent to *Barlow's*, the Fifth Circuit has reasoned, in a case involving the Secretary's right to inspect documents incident to an investigation under Executive Order 11246, that where an investigative scheme contains the "equivalent" of the warrant procedure, a warrant may not be required as a precondition for an investigation. The Fifth Circuit held that where a statutory or regulatory scheme provides for resort to a federal court before inspection is forced upon an establishment, the inspection procedure provides a forum for evaluating the reasonableness of the investigation, rendering the warrant process unnecessary. *United States v. Mississippi Power & Light Co., supra*, 638 F.2d at 907.

The same court made clear, however, that the substantive requirements of *Barlow's* still must be satis-

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[3] Section 8(c) of OSHA, 29 U.S.C. § 657(c), provides, *inter alia*, that an employer must "make, keep and preserve and make available to the Secretary [of Labor] . . ." records relating to the employer's activities under OSHA as may be required by regulations issued by the Secretary to effectuate the purposes of the OSHA statute. These records may include documents such as reports on work-related illnesses or injuries, or information on employees' medical history. *See, e.g.*, 29 C.F.R. 1910.20 (1982).

fied as to the inspection involved. Thus, where the Secretary requests a federal district court to compel an employer to permit an inspection of records pursuant to an administrative investigation, the district court must determine whether the investigation being sought satisfies "the broad fourth amendment test of 'reasonableness.'" *Id.* quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-39 (1967). As the Fifth Circuit stated:

> The proper elements of such an inquiry necessarily must vary with the nature and circumstances of the search that is desired, although *Barlow's* gives some general guidance to the district court. One element of the question is whether the proposed search is authorized by statute, and a second is whether it is properly limited in scope. 436 U.S. at 323. * * * A third element should be an examination of how the agency chose to initiate this particular search. The search will be reasonable if based either on (1) specific evidence of an existing violation, (2) 'a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]' ". 436 U.S. at 320-21 * * *, or (3) a showing that the search is 'pursuant to an administrative plan containing specific neutral criteria.' 436 U.S. at 323 * * * It is important that 'the decision to enter and inspect . . . not be the product of the unreviewed discretion of the enforcement officer in the field. See v. [City of] Seattle, 387 U.S. 541, 545 (1967). * * * *Id.* at 907-08.

As noted, the specific question before the Fifth Circuit was the constitutional reasonableness of a re-

quest by the Secretary for access to an employer's records in order to assess compliance with Executive Order 11246. Applying the criteria quoted above, the court found that the request was within the Secretary's statutory authority, and that it was properly limited in scope because it was restricted "solely [to] business records to test compliance with the affirmative action program." 638 F.2d at 908. The court, however, found the record before it insufficient to determine whether the third criterion had been satisfied, i.e., that the request had been pursuant to an administrative plan containing specific, neutral criteria. In the absence of such proof, the Fifth Circuit would not approve the investigation and instead remanded the case to the district court for a determination on the point. *Id.*

Recently, the Eighth Circuit has applied the substantive requirements of *Barlow's* specifically to an administrative subpoena duces tecum requested by the Secretary in connection with an OSHA investigation. *Donovan v. Union Packing Co. of Omaha, supra.* Pursuant to Section 8(b) of OSHA, the Secretary sought enforcement of a subpoena seeking access to an employer's records of occupational injuries and illnesses to its workforce, workmen's compensation claims, and the number of employees and number of hours worked. The court rejected the argument that the Secretary must obtain a warrant to gain access to such records by means of a subpoena. Nevertheless, the court applied the substantive requirements of *Barlow's* and examined whether the Secretary's request for the subpoena was based on specific "neutral criteria." 11 BNA OSHC at 1651.

Applying the *Barlow's* criteria, the court approved the subpoena on narrow grounds. Thus, the court first found that the Secretary had selected the particular employer for a preliminary investigation of its accident and illness rate in accordance with the Secretary's plan for "programmed inspections." Under this plan, a workplace was selected for an inspection if it was a member of what the Secretary identified as a high hazard industry, and its lost workday injury rate exceeded a certain average rate. *Id.* The Eighth Circuit found that "[because] Union Packing Company's records were sought based on the neutral criteria that the company was a member of a high hazard industry, the evils the Supreme Court sought to guard against in *Barlow's* are simply not present." *Id.*[4]

Thus, even in the context of a "high hazard" industry, the Eighth Circuit only approved the document request because "the request for documents . . . [was] much narrower than that involved in *Barlow's*." 11 BNA OSHC at 1651. The court also stressed the language in *Barlow's* in which the Supreme Court rejected the Secretary's position that "records required by the Act" and "any additional records" an OSHA in-

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[4] The sufficiency of the Secretary's high hazard industry program as a basis for selecting investigation targets under OSHA has been a subject of judicial debate. *See, e.g.*, In the Matter of Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978); Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 378 (7th Cir. 1979); In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co., —— F. Supp. ——, 5 BNA OSHC 1375 (N.D. Ill. 1977), aff'd 589 F.2d 1335 (7th Cir.), cert. denied, 444 U.S. 884 (1979). For the instant purpose, however, the point is that the Eighth Circuit applied the *Barlow's* test of whether the employer had been selected to receive a subpoena on a specific, neutral basis.

spector requests may be inspected without compliance with the neutral criteria standard. *Id. A fortiori*, where, as in the instant case, the FLSA inspector refuses to disclose the motive for the administrative search or records request, the *Barlow's* rationale would bar the request to inspect the documents.

C. The FLSA Enforcement Scheme Presents the Precise Evils of "Unbridled" Administrative Discretion Which the *Barlow's* Requirements Are Intended to Curb.

In *Barlow's*, the Court indicated that whether the rationale of that decision would be extended to statutes other than OSHA would depend on the specific enforcement needs and privacy guarantees of each statute. 436 U.S. at 321. Applying this test, it is clear that the *Barlow's* rationale should be extended to FLSA, since the FLSA enforcement scheme contains even less privacy guarantees for commercial establishments than did OSHA before *Barlow's*. Section 8(a) of OSHA contains at least a modicum of limiting language, in that it requires the Secretary's investigations to be performed "at reasonable times and within reasonable limits and in a reasonable manner." 29 U.S.C. § 657(a). No such language, however, appears in FLSA Section 11(a). Rather, that provision authorizes the Secretary to "enter and inspect such places *and such records* . . . question such employees, and investigate such facts, conditions and practices or matters as he may deem necessary or appropriate to determine whether any person has violated [FLSA]." 29 U.S.C. § 211(a) (Emphasis added). Section 9 of FLSA, which specifically confers subpoena power upon the Secretary, likewise contains no limiting language; it simply makes applicable to FLSA investiga-

tions the subpoena procedure of 15 U.S.C. 49 and 50. 29 U.S.C. § 209. This absence of statutory limits on the Secretary's discretion makes it all the more compelling that business owners have a means to assure that FLSA investigations will be pursuant to an administrative plan containing specific, neutral criteria.

The need to apply such standards to the Secretary's FLSA subpoena power in particular is all the more apparent inasmuch as the investigation procedure developed by the Secretary contains no investigatory plan or criteria, and gives business owners no notice as to when they can expect to be the subject of an FLSA investigation. The regulations promulgated by the Secretary are silent on how the Secretary will select targets for FLSA subpoenas. Instead, consistent with the broad statutory grant of discretion, the regulations purport to arrogate to the Secretary the greatest possible latitude, providing that a business owner's "records shall be open at any time to inspection and transcription by the [Wage and Hour] Administrator or his . . . representative." 29 C.F.R. § 516.7(b) (1982).[6] In addition, the stipulated facts in this case illustrate that the Secretary interprets and applies his authority under FLSA so as to refuse flatly to disclose to business owners the reason they are chosen for investigation. Thus, when appellee's counsel inquired as to the reason appellee was selected, appellant Gilbert wrote appellee that "the motive for the investigation will not be given" (Jurisdictional Statement 3a-3b).

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[6] Significantly, the regulations promulgated by EEOC to implement the Equal Pay Act and ADEA are equally silent on how targets for investigation will be selected. See 29 C.F.R. § 1620.19 (1982) (Equal Pay Act); 29 C.F.R. 1626.15 (1982) (ADEA).

In sum, the FLSA investigatory scheme as exemplified by the Secretary's use of the subpoena power in this case presents precisely those vices which the Supreme Court sought to eliminate in *Barlow's*. In FLSA, "Congress has authorized inspection but made no rules governing the procedures that inspectors must follow. . . ." Accordingly, "the Fourth Amendment and its various restrictive rules apply." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). EEAC, therefore, urges the Court to make clear that when the Secretary seeks to enforce an administrative subpoena duces tecum pursuant to FLSA Sections 11(a) and 9, the district court should apply *Barlow's* and require the Secretary to show that the subpoena satisfies Fourth Amendment requirements, including, in particular, that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to [the] particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967); *United States v. Mississippi Power & Light Co., supra.*[6]

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[6] The same test should be applied by a district court to an administrative subpoena *duces tecum* issued by EEOC to investigate Equal Pay Act and ADEA violations, since both statutes incorporate section 11 of the FLSA.

Such a ruling, moreover, would accord with proper administration of Title VII, 42 U.S.C. § 2000e, *et seq.* (1980). Under Title VII of the Civil Rights Act of 1964, a valid charge of prohibited discrimination is a condition precedent to the investigatory authority of EEOC. See EEOC v. Shell Oil Co., 676 F.2d 322 (8th Cir. 1932), *pet. for cert. granted*, No. 82-825. Section 706(b) of Title VII mandates that an employer who is charged with violating Title VII must be given notice of the "date, place and circumstances of the alleged violations." Also, EEOC's own regulations require a "clear and concise statement of the facts, including pertinent dates, constituting

II. THE GOVERNMENT'S ARGUMENT THAT AN AGENCY MAY INSPECT ANY DOCUMENTS RELATED TO A STATUTORY ENFORCEMENT SCHEME FAILS TO CONSIDER DIRECTLY CONTRARY LANGUAGE IN *BARLOW'S* AND MISCONSTRUES OTHER CASE AUTHORITY

In *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186 (1946), the Court affirmed the Secretary's subpoena authority under FLSA. The Court held that for constitutional purposes, "[i]t is not necessary . . . that a specific charge or complaint of violation of law be pending or that the order [enforcing a subpoena] be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." 327 U.S. at 209. The requirement of " 'probable cause' ", the Court said,

> is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particu-

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the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3).

As compared with the strict requirements of Title VII and EEOC's implementing regulations, the broad discretion afforded the EEOC investigators under FLSA Sections 11(a) and 9 provides a tempting means to circumvent the limitations on investigations which Title VII imposes. The opportunity to utilize the investigatory license of ADEA and the Equal Pay Act to search for evidence of Title VII violations is manifest. The imposition of the substantive requirements of *Barlow's* on subpoenas issued under the Equal Pay Act and ADEA would diminish the likelihood of such investigatory abuse.

> larity in 'describing the place to be searched, and the person or things to be seized,' * * * comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. *Id.* (Footnote omitted).

Far from sanctioning any and all FLSA investigations, *Oklahoma Press* recognized that relevancy, adequacy and "excess in breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." 327 U.S. at 209. Obviously, the *Barlow's* decision, rendered almost four decades later, fills the gaps recognized by the *Oklahoma Press* holding.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court construed the power of the Federal Trade Commission to compel corporations to file reports concerning their compliance with a cease and desist order. As noted above, FLSA Section 9 incorporates the provisions of the Federal Trade Commission Act governing the use of subpoenas duces tecum. The Court in *Morton Salt* held that the reporting requirement was valid, stating the agency could conduct an investigation of the compliance records even if the request was prompted by "nothing more than official curiosity." 338 U.S. at 652. But the question presented in the instant case—the authority of the agency to initiate an investigation without giving reasons for doing so—was not even within the contemplation of the *Morton Salt* opinion. The latter dealt only with the agency's continuing supervisory authority over a proven violator of the Federal Trade Act. *Morton Salt* thus would not inhibit the application of the *Barlow's* standards to FLSA investigations *ab initio*.

Appellants rely heavily in their brief on *Oklahoma Press, Morton Salt* and their progeny to establish that the district court below improperly required the Secretary to obtain a search warrant in order to enforce the subpoena duces tecum. The appellants' argument, however, does not address the point which EEAC desires to emphasize. The question here is not only whether the procedure of a warrant is necessary to protect the privacy interests of the business owner subjected to a subpoena. It may be assumed for the purpose of our argument that because the Secretary must file a civil action in federal court to enforce an FLSA subpoena under 15 U.S.C. § 49, an adequate forum for the business owner to assert his privacy interests is provided. See *Donovan v. Dewey, supra*, 452 U.S. at 604-05. The crucial question from EEAC's viewpoint is whether a district court which is requested to enforce a subpoena will require the Secretary to show that his investigatory target was chosen on the basis of specific, neutral criteria.

EEAC submits that the holdings of *Oklahoma Press* and *Morton Salt* must be read alongside *Barlow's*, which logically requires that a district court requested to enforce an administrative subpoena apply several tests of reasonableness. Thus, after *Barlow's* it can no longer logically be enough that a subpoena is authorized by statute, for a purpose which Congress may authorize. (Brief for Appellants at 12). Such a subpoena may be unconstitutional if its issuance "is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Barlow's, supra*, 436 U.S. at 323. Similarly, after *Barlow's*, it can no longer logically be sufficient that the records which

the Secretary seeks in the subpoena be those which the particular statute and implementing regulations require the business owner to maintain. (Brief for Appellants at 18).[7] Such subpoena would be constitutionally overbroad, for "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 324 n.22. And finally, if anything is clear after *Barlow's*, it is that the Secretary may not issue a subpoena just to satisfy "nothing more than official curiosity." *United States v. Morton Salt Co., supra*, 338 U.S. at 652 . Plainly, the investigation must be based on a reasonable legislative or administrative plan, and on specific neutral criteria. *Barlow's, supra.*

To be sure, the rationale of *Barlow's* does not mean that the traditional tests of reasonableness under the Fourth Amendment have lost their vitality. It remains crucial that the subpoena is authorized by statute, and is properly limited in scope. *United States v. Mississippi Power & Light Co., supra*, 638 F.2d at 907. In light of *Barlow's*, however, "a third element should be an examination of how the agency

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[7] Clearly, the record here indicates that the employer emphatically refused to consent to the administrative search of its records. More generally, the courts have made clear that employers cannot be presumed to have consented to a records search (or to have waived the right to object to such a search) merely because they do business in an area in which government regulations require records to be kept. Federal contractors, and employers generally, are subject "only to those reviews which employ reasonable searches as that term is defined under the Fourth Amendment [and by *Barlow's*]." First Alabama Bank of Montgomery v. Donovan, 692 F.2d 714, 718-20 (5th Cir. 1982) (Executive Order 11246). *See also* United States v. Mississippi Power & Light, *supra*, 639 F.2d at 906-07.

chooses to initiate th[e] particular [investigation]." *Id.* The district court "may find other questions relevant to the reasonableness of the proposed [document request] under the Fourth Amendment, but *these three elements, at least, are essential.*" *Id.* at 908.[8]

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[8] The post-*Barlow's* decisions of the lower courts upon which appellants rely are inapposite to the point which EEAC here emphasizes. Thus, in EEOC v. Bay Shipbuilding Corp., 668 F.2d 304 (7th Cir. 1981), the court addressed *Barlow's* only on the question whether EEOC was required to demonstrate "probable cause" in order to enforce a subpoena. There was no dispute as to the reason EEOC investigated the employer involved; a former employee had filed a charge of discrimination. 668 F.2d at 306. In Re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979), provides no support to appellants' position since the court actually refused to enforce the subpoenas in question because they were overbroad, and because they also inquired into matters protected by the attorney-work product doctrine. In Marshall v. Walbridge, 84 Lab. Cas. (CCH) para. 33,723 (N.D. Ind. 1978), two employees had filed complaints with the Secretary's Wage and Hour Division asserting that they had not been paid proper overtime; thus a specific reason for the FLSA investigation was established. In Marshall v. Stevens People & Friends for Freedom, 669 F.2d 171 (4th Cir.), cert. dismissed, 455 U.S. 930 (1982), there was no question over the reason that the individuals and committees subpoenaed were chosen for investigation under the Labor Management Reporting and Disclosure Act. The statute contains affirmative obligations to disclose information concerning efforts to persuade employees in the exercise of their collective bargaining rights, and the targets of the subpoenas had stated their intent to convince the employees of J.P. Stevens Co., Inc. to oppose unionization. 669 F.2d at 173. In Donovan v. Shaw, 668 F.2d 985 (8th Cir. 1982), there again was no question why the pension fund in issue was chosen for investigation under ERISA; the fund had requested a determination from the Internal Revenue Service that it remain tax exempt notwithstanding certain changes in the ERISA statute. 668 F.2d at 987. Finally, in

III. EVEN IF A WARRANT IS NOT REQUIRED, THE GOVERNMENT'S INSPECTION CANNOT PROCEED WITHOUT A REMAND TO THE DISTRICT COURT FOR A DETERMINATION ON THE REASONABLENESS OF THE SUBPOENA

Applying the three elements of reasonableness set forth by the Fifth Circuit in *United States v. Mississippi Power & Light* to the subpoena here, it it is apparent that the first test, which is one of law, has been satisfied; the subpoena was issued within the Secretary's statutory authority under FLSA Sections 11(a) and 9. 638 F.2d at 908. The second and third tests, however, cannot be satisfied on this record.

The second test, also deemed one of law by the Fifth Circuit, is whether the subpoena is properly limited in scope. *Id.* This question, however, depends in turn on the reason for the investigation, i.e., on the reason why the instant appellee was chosen for inquiry by the Secretary. As noted in the Statement of Facts, the Secretary expressly refused to inform the appellee why it was chosen, and the record does not otherwise reveal the reason.

EEAC submits, therefore, that even if a warrant is not required, this Court should not merely permit the investigation to proceed. Rather, the case should be remanded to the district court with specific in-

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Donovan v. Mehlenbacher, 652 F.2d 228 (2d Cir. 1981), it was clear that the Secretary decided to investigate the farming operation involved because of the history of two of the farmer's labor contractors, and because of a newspaper report on the conditions at the farm. 652 F.2d at 229.

In sum, none of these authorities support the proposition that the *Barlow's* substantive requirements are not to be applied when a district court is determining whether to enforce an FLSA subpoena duces tecum.

structions. First, the district court should be instructed to inquire into the factual question of why the Secretary chose the appellee for investigation. *Id.* The Court should make clear that the test to be applied on this point is the one articulated in *Barlow's*, i.e., that the appellee must have been chosen on the basis of specific, neutral criteria. The district court should further be instructed that if it is satisfied that appellee was chosen on a basis which satisfies this Court's concerns in *Barlow's*, a careful evaluation of the scope of the subpoena should next be made. As did the Eighth Circuit in *Donovan v. Union Packing Co. of Omaha*, *supra*, the district court should approve the subpoena only to the extent that its scope is strictly limited to accomplishing the specific, revealed purpose of the investigation. Circumscribing overbroad subpoenas is as important in protecting the privacy rights of business owners as is assuring that a rational basis underlies selection of investigatory targets. If the agency cannot satisfy these requirements, the investigation cannot be permitted to proceed.

CONCLUSION

For the reasons stated above, and given the state of the instant record, EEAC respectfully submits that should a *Barlow's*-type warrant not be required, the Court should remand the case to the court below with instructions to apply the substantive requirements of *Barlow's* to any subsequent enforcement proceeding.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
STEPHEN C. YOHAY
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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No. 82-1684

IN THE

Supreme Court of the United States

October Term, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF THE NATIONAL RESTAURANT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

ROBERT W. HARTLAND
LARAINE R. ALLEN
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, PA 15219
(412) 288-3131

Counsel for *Amicus Curiae*
National Restaurant Association

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA 15219

QUESTION PRESENTED

Whether Appellants violate the Fourth Amendment to the United States Constitution when they rely upon the warrantless, on-site investigation and inspection provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211, to gain entry, over objection, to an employer's place of business for the purpose of conducting an investigation and inspection of the employer's premises and records.

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. The Warrantless Entry and Inspection Provisions of FLSA Section 11 Violate The Fourth Amendment	14
II. The Government's Characterization of This Case as a "Simple Subpoena Case" is Misleading and Erroneous	17
III. The Government's Investigation Technique of Responding to Employer Resistance to On-Site Investigations by Directing The Employer to FLSA Section 11 Is Misleading and Calculated to Obtain a Coerced Consent to Such Investigations	22
CONCLUSION	25

TABLE OF CITATIONS

CASES	PAGE
Bumper v. North Carolina, 391 U.S. 543 (1968)	23, 24
Camara v. Municipal Court, 387 U.S. 523 (1967)	11, 14
Jones v. Unknown Agents of Federal Election Commission, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied* 444 U.S. 1074 (1980)	23, 24
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	*passim*
See v. City of Seattle, 387 U.S. 541 (1967)	14
United States v. Oregon State Medical Soc., 343 U.S. 326 (1952)	21
United States v. Raines, 362 U.S. 17 (1960)	20
United States v. W. T. Grant Co., 345 U.S. 629 (1953)	21

CONSTITUTION, STATUTES AND REGULATIONS

PAGE

U.S. Const. Amend. IV (Warrant Clause) ..... *passim*

Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) §§ 201 *et. seq.*:
Section 9, 29 U.S.C. § 209 6
Section 11, 29 U.S.C. §211 ..... *passim*
Section 11(a), 29 U.S.C. § 211(a) ..... *passim*

Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a) 11, 14

United States Code Title 28, Judiciary and Judicial Procedure, 28 U.S.C. § 1252 20

OTHER

PAGE

Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, *Field Operations Handbook*, Chapters 52, 86 and 100:
Chapter 52, Section 52a00(a) (1971) 5, 16
Chapter 52, Section 52a00(b) (1971) 4, 5, 16
Chapter 52, Section 52a05(a) (1971) 5, 21, 22
Chapter 52, Section 52d00 (1976) 4
Chapter 86, Section 86b00(a) (1975) 6, 21, 22
Chapter 86, Section 86b00(c) (1975) 6, 22
Chapter 100, Section 100a00(a) (1972) 4

C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure:* Jurisdiction § 4037 (1978) 20

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v.

LONE STEER, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF THE NATIONAL RESTAURANT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

This brief *amicus curiae* is filed by the National Restaurant Association with the consent of all parties, as provided for in Rule 36.2 of the Rules of this Court. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The National Restaurant Association is a national membership association of foodservice operators. Since the Association's membership comprises approximately

one-fifth of the 560,500 foodservice establishments in the United States, the National Restaurant Association is a principal spokesman for the industry.

Restaurateurs have become concerned over the years with the random and arbitrary nature of Department of Labor inspections under the Fair Labor Standards Act. Frequently these inspections are unannounced and, generally, they are on-site inspections. Many of these inspections are disruptive of business operations and are conducted without any employee complaint or other indication that an FLSA violation has occurred. There currently exists considerable confusion among restaurateurs concerning their rights in connection with such inspections and the Court's decision in this case will help to define the limits of the Labor Department's authority in the conduct of these investigations. Thus, the Association submits this *amicus curiae* brief because the Court's decision in this matter will have a significant effect on the foodservice industry.

STATEMENT OF THE CASE

On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned Lone Steer, Inc., Appellee, a motel-restaurant located in Steele, North Dakota ("Lone Steer"). Mr. Godes informed Lone Steer's Manager, Susanne White, that he would be at the employer's establishment at 9:00 a.m. the following morning to conduct an investigation of the establishment. The investigation was to be conducted pursuant to the authority provided in Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §211, and its purpose was to determine whether Lone Steer was in compliance with

the FLSA. Ms. White was to have available and produce for his investigation, the time, wage and payroll records for all employees for the last two years (J.A. 12). Mr. Godes did not request the employer's permission to engage in this on-site investigation, nor did he state that he had, nor did he have, any warrant authorizing the entry and inspection in question (J.A. 12). Ms. White telephoned Mr. Godes later that day and informed him that it was not convenient for Mr. Godes to conduct the investigation the following morning (J.A. 12).

The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he would commence his investigation at 9:00 a.m. on January 14, 1982 at Lone Steer premises (J.A. 12-13). After learning of Mr. Godes' intention to conduct this on-site investigation of Lone Steer, Ms. White contacted Lone Steer's attorney, Mr. Richard G. Peterson. On January 12, 1982, attorney Peterson wrote Mr. Godes requesting information regarding the scope of the demanded investigation and inquiring whether the investigation was prompted by any complaint having been filed against Lone Steer. In that letter attorney Peterson specifically denied permission to conduct the investigation at Lone Steer premises until the matters of the scope and rationale of the investigation were resolved (J.A. 13).

Mr. Godes forwarded attorney Peterson's letter of January 12, 1982 to the Regional Office of the Wage and Hour Division in Denver, Colorado (J.A. 14). By letter dated January 20, 1982, Loren E. Gilbert, the Assistant Regional Administrator for the Wage and Hour Division, responded to Mr. Peterson's letter of January 12, 1982 (J.A. 14, 23). Mr. Gilbert refused to reveal how or why Lone Steer was chosen for this investigation. Mr. Gilbert refused to reveal whether the investigation was initiated

by reason of a filed complaint and specifically declined to disclose the "motive" for the investigation (J.A. 14, 23).

Mr. Gilbert's position in his January 20, 1982 letter is consistent with the United States Department of Labor's official policy on the matter as published in Appellants' Field Operations Handbook ("FOH").[1] It is the Department's published position that the Wage and Hour Division's investigative authority is not dependent upon the existence of a filed complaint. Specifically, Chapter 52 of the FOH deals with the selection of establishments to be investigated and, except for special circumstances, places this responsibility on the area offices of the Wage and Hour Division, functioning through the local compliance officers. Chapter 52, Section 52a00(b) provides that:

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1. Appellants' Field Operations Handbook is described in its Chapter 100, Section 100a00(a) as follows:

> The FOH is the basic manual for direction and guidance of Wage-Hour personnel in the uniform and proper administration and enforcement of the Acts administered by Wage-Hour. It sets forth the official USDOL interpretation and position on various aspects of these Acts, and provides the operating policies and procedures to be followed in the conduct and disposition of investigations carried out under the administered laws.

Appellants' official policy regarding the nondisclosure of the rationale for an investigation is contained in Chapter 52, Section 52d00 of the FOH as follows:

> The CO shall take no action which would reveal the existence of a complaint or disclose the identity of a complainant. As a matter of policy, WH (Wage-Hour Division) does not disclose the reasons for an investigation. Where inquiry is made concerning the reasons for an investigation, the inquirer shall be told that investigations are made for a variety of reasons . . .

> The CO (compliance officer) *must* develop a "feel" for establishments likely to be in substantial violation and submit these as leads; he *must* be constantly receptive to complaints. No AD (Area Director) or CO can be content to wait for valid complaints or good leads to turn up in his area: they must participate actively in seeking them out. The most important part of the investigative process lies in determining *in advance* which establishments most *need* to be investigated and scheduling these for investigation . . .(Emphasis in original.)

The degree of investigative discretion of the local Wage and Hour officials is further reflected by the following "general consideration" set forth in Chapter 52, Section 52a00(a):

> The key is flexibility to do what makes sense in a given situation, the authority to make judgments as to what is essential to a sound investigation and what is not, and the acceptance of the responsibility for the judgments made. Factors basic to effective enforcement by investigation may be stated as follows:
>
> (1) Which establishments shall be investigated?

Notwithstanding Lone Steer's written objection to Appellants' investigation, Mr. Gilbert instructed compliance officer Godes to initiate the described investigation on February 2, 1982 at 10:30 a.m. *at Lone Steer's offices* in Steele, North Dakota (J.A. 14, 23). Mr. Gilbert informed Lone Steer's attorney of this in his letter to Peterson of January 20, 1982, and Gilbert specifically directed Mr. Peterson to Section 11 of the FLSA regarding the Secretary's investigative authority (J.A. 14, 23).[2]

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2. It is Section 11(a) of the FLSA which purports to authorize the Secretary of Labor to conduct investiga-

Mr. Gilbert's direction of Mr. Peterson to Section 11 of the FLSA was also consistent with official, published Department of Labor policy. Specifically, Chapter 52, Section 52a05(a) of the FOH deals with employer refusals to permit an on-site investigation and provides in relevant part:

> If an employer refuses to permit an investigation, his attention shall be directed to Secs 9 and 11(a) of the FLSA . . . and he shall be reminded that his refusal may result in the issuance of a subpoena or other court process. If permission to investigate is still refused, the CO shall take no further action and shall refer the matter promptly to the AD (Area Director).[3]

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tions and specifically authorizes the Secretary to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate . . ."

3. This practice of referring a reluctant employer to the inspection provisions of Section 11 is also mandated by FOH Chapter 86, Section 86b00(a). In addition, this technique is repeated at a higher administrative level if the employer persists in refusing an on-site inspection. Chapter 86, Section 86b00(c) of the FOH instructs the Wage and Hour Area Director to contact such an employer, attempt to persuade him to permit the desired inspection, and once again to direct his attention to the Division's statutory inspection authority. Specifically, Section 86b00(c) provides as follows:

> If a letter is sent to the employer, it shall review the AD's understanding of the events surrounding the employer's refusal to permit access to the firm's records, and shall indicate the scope of the Division's investigatory powers as set out in FLSA Secs 9 and 11(a), and shall request the employer to reconsider the refusal.

Finally, after directing attorney Peterson's attention to the language of Section 11 of the Act, Gilbert requested that he be notified if the employer was going to continue to prohibit the February 2, 1982 investigation at Lone Steer premises, so that he might request an administrative subpoena to conduct the investigation (J.A. 14, 23). Beyond Mr. Gilbert's general description of the scope of the investigation and his statement that it was to take place "at Lone Steer's offices in Steele, North Dakota", Mr. Gilbert provided no information regarding who or what would be subpoenaed (or where the subpoena would be returnable) in the event of further employer resistence. (J.A. 14, 23)

By letter dated January 28, 1982, Lone Steer attorney Peterson responded to the January 20, 1982 letter of Mr. Gilbert. Attorney Peterson again objected to the "non-consensual, warrantless investigation at the Lone Steer Cafe/Motel" scheduled for February 2, 1982, which Gilbert directed to take place over Peterson's earlier objection. Attorney Peterson specifically referred Mr. Gilbert to the decision of this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and, in reliance upon *Barlow's*, again informed Mr. Gilbert that Lone Steer would not submit to the demanded investigation without a valid search warrant from an independent magistrate.[4]

On February 1, 1982, faced with the threat of a February 2, 1982 non-consensual investigation and inspection at Lone Steer's place of business—purportedly au-

4. Peterson's January 28, 1982 letter to Mr. Gilbert was attached as Exhibit "H" to Plaintiff's Memorandum Brief In Support Of Temporary Restraining Order, filed February 1, 1982 in Civil Action No. A1-82-10. (*see also* J.A. 14-15).

thorized under Section 11 of the FLSA—Lone Steer filed suit against Appellants at Civil Action No. A1-82-10 in the United States District Court for the Northern District of North Dakota (J.A. 1). In that action, Lone Steer sought a temporary restraining order, preliminary injunction and permanent injunction preventing Appellants from entering Lone Steer's premises and from seizing any of Lone Steer's property without obtaining a valid search warrant from an independent magistrate (J.A. 22). Lone Steer also alleged that the threatened investigation "pursuant to Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution" (J.A. 21). Consequently, Lone Steer requested a declaratory judgment that such non-consensual inspections were unconstitutional (J.A. 22).

The following day, February 2, 1982, Mr. Godes, accompanied by Mr. Gerald Hill, Assistant Area Director of the Denver, Colorado office of the Wage and Hour Division, entered the Lone Steer facility in Steele, North Dakota to attempt to conduct the objected to, on-site investigation (J.A. 15). The manager of Lone Steer did not appear or produce any records. At that point, Mr. Godes served a subpoena on an employee of Lone Steer (J.A. 15). The subpoena directed an officer, agent or employee of Lone Steer having custody and personal knowledge of Lone Steer's records to appear before Mr. Godes at the Wage-Hour Office in Bismarck, North Dakota on February 9, 1982, "to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc." (J.A. 15, 25). The subpoena also required the production of certain payroll, time and personnel records pertaining to each employee over the past three years, together with certain specified sales

information covering a three-year period (J.A. 15-16, 25-26).

In light of the pending injunction/declaratory judgment action, Lone Steer's attorney contacted counsel for the Department of Labor in Denver and objected to the Department of Labor's investigation procedure of issuing this administrative subpoena after repeated efforts to force a Section 11, on-site investigation of Lone Steer (J.A. 16-17). Mr. Peterson informed counsel for the United States Department of Labor that Lone Steer would not respond to the subpoena [5] (J.A. 16).

On March 3, 1983, the Secretary of Labor initiated its own action in the district court, at Civil Action No. A1-82-24, to compel Lone Steer to comply with the administrative subpoena (J.A. 7). The district court subsequently consolidated Lone Steer's injunction and declaratory judgment action with the Secretary's enforcement action (J.A. 7-8).

Both Lone Steer and Appellants filed Motions for Summary Judgment upon a stipulation of facts (J.A. 4, 8). In an opinion signed October 27, 1982 (J.S. App. 1a-8a), the district court concluded that:

> The Secretary's argument that *Barlow's* does not apply to Section 11 investigations is untenable. It is reasonable to conclude that the exigencies of an entry upon commercial premises for the purpose of conducting a safety and health inspection designed

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5. Subsequent to the service of the subpoena upon Lone Steer, Appellee amended and expanded its earlier filed complaint in Civil Action No. A1-82-10 to recite the Department's subsequent conduct of issuing a subpoena after entry to inspect had been denied (J.A. 2, 21).

to protect the personal well-being of employees supply more compelling bases for proceeding without a warrant than the circumstances presented here, where entry is sought for the purpose of determining compliance with wage and hour regulations. The reasoning of the Supreme Court in *Barlow's* applies with equal—if not greater—force in the instant situation.

Consequently, the district court granted summary judgment in favor of Lone Steer and against Appellants in both Civil Action Nos. A1-82-10 and A1-82-24 (J.A. 4, 8). On October 28, 1982, the district court entered identical orders in both actions ordering that "the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant . . . " (J.A. 4, 8).

On November 8, 1982, the Secretary of Labor filed a Motion To Alter Or Amend Judgment requesting that the judgments in both Civil Action Nos. A1-82-10 and A1-82-24 be amended to order compliance by Lone Steer with the subpoena of the Department of Labor (J.A. 5, 9, J.S. App. 15a-17a). This Motion was denied by the district court on November 24, 1982 (J.A. 5, 9).

By separate Notices of Appeal dated December 15, 1982, Appellants appealed both the October 28, 1982 Judgment of the district court in Civil Action No. A1-82-10 and the October 28, 1982 Judgment of the district court in Civil Action No. A1-82-24 (J.A. 5, 9).

SUMMARY OF ARGUMENT

Section 11(a) of the Fair Labor Standards Act purports to authorize the warrantless entry of an employer's premises by representatives of the Secretary of Labor for the purpose of questioning employees, inspecting the premises, inspecting and transcribing documents and investigating "such facts, conditions, practices or matters as he may deem necessary or appropriate" to determine whether any person has violated any provision of the FLSA.

In 1978, however, this Court held in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), that the federal statute there involved (*i.e.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. §657(a)) was unconstitutional insofar as it purported to authorize nonconsensual inspections of an employer's premises and records without a warrant or its equivalent. In so holding, this Court not only reaffirmed the proposition that the Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes, but also reaffirmed its prior holding that warrantless searches of commercial premises, as well as homes, are presumptively unreasonable. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

As the district court here concluded, the reasoning of this Court in *Barlow's* applies with equal—if not greater—force to the present case. As in *Barlow's*, the present case does not fall within the narrow "pervasively regulated business" exception to the warrant requirement. Moreover, as the district court noted, if the exigencies of an entry upon commercial premises to conduct a health inspection designed to protect the personal well-being of employees were held insufficient to justify a warrantless inspection, as in *Barlow's*, there exists significantly less

justification for Section 11's warrantless inspection provisions where entry is sought solely to determine compliance with wage and hour laws. The Department of Labor's compliance with the warrant requirement in the present case would present no serious burden to its investigation scheme. Here, as in *Barlow's*, the protections afforded the employer's privacy by a warrant are significant, especially in light of the Department of Labor's broad authority under Section 11 to demand entry, without explanation, at any time. Here, as in *Barlow's*, the authority to make warrantless searches devolves almost unbridled discretion upon government officers, particularly those in the field, as to when, whom and what to search.

Notwithstanding the clear applicability of *Barlow's* to the warrantless inspection and investigation provision of Section 11 of the FLSA, Appellants here—pursuant to Section 11—sought to conduct an on-site investigation of Lone Steer, Inc. over Lone Steer's repeated objections. Appellants did not serve the administrative subpoena demanding the off-site production of records and testimony, until after repeated efforts to conduct such an on-site inspection over Lone Steer's objection had failed. Indeed, Appellants did not serve the subpoena until after Lone Steer initiated court action seeking to enjoin such warrantless, on-site inspections and seeking a judgment declaring Section 11's warrantless inspection provisions unconstitutional. Appellants' characterization of this controversy as a "simple administrative subpoena" case ignores the history of this dispute, and is erroneous.

Indeed, Appellants actually have "institutionalized" this deprivation of Fourth Amendment rights through the promulgation and implementation of official policy. Specifically, when a Wage and Hour official faces em-

ployer opposition to a demanded on-site inspection, the official is directed, by published Government policy, to specifically direct the employer's attention to the warrantless entry and inspection provisions of Section 11(a) of the Act. This policy was followed in the present case.

In light of the clear applicability of this Court's holding in *Barlow's* to the warrantless inspection provisions of Section 11 of the FLSA, it is improper for the Appellants to regularly rely upon that Section to force entry into business premises over objection. Further, the Government compounds the impropriety of its reliance upon Section 11 by its policy and conduct of specifically directing employers to that Section's warrantless entry and inspection provisions when employer resistence to an on-site inspection is encountered. This official conduct is intentionally misleading and is calculated to obtain a form of coerced "consent" to the demanded on-site investigation in deprivation of the employer's constitutional rights.

This routinized deprivation of constitutional rights through Appellant's enforcement policy should end. It is respectfully submitted that the Court should hold that Section 11 of the FLSA is unconstitutional insofar as it purports to authorize non-consensual on-site inspections without a warrant or its equivalent. The judgments of the district court should be affirmed.

ARGUMENT

I. The Warrantless Entry And Inspection Provisions Of FLSA Section 11 Violate The Fourth Amendment.

This Court, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), held that the entry and inspection provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. §657(a)) were unconstitutional insofar as they purported to authorize nonconsensual inspections of an employer's premises and records without a warrant or its equivalent. The OSHA provision before the Court in *Barlow's* purported to allow agents of the Secretary of Labor to "enter without delay any . . . workplace" and to "inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment . . . and to question privately any such employer, owner, operator, agent or employee."

In holding this warrantless entry and inspection provision unconstitutional, this Court, relying upon its previous holdings in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967), first reaffirmed the principle that a

> businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violations of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

436 U.S. at 312, quoting *See v. City of Seattle*, 387 U.S. at 543.

In applying this basic principle, the Court in *Barlow's* held that the Fourth Amendment requires a warrant or its equivalent before an OSHA inspector may enter and inspect an employer's premises without consent. In reaching this conclusion, the Court reasoned that the potential invasion of an employer's privacy interests, made possible by OSHA's broad inspection authority, was significant enough to require the protection of a warrant. The Court reasoned that OSHA's entry and inspection provision was so far-reaching as to "devolve [] almost unbridled discretion upon executive and administrative officers particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. According to the Court, such wide administrative discretion is constitutionally impermissible, requiring a warrant to "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id.*

This Court, in the *Barlow's* case, rejected the Government's contention that warrantless inspections were essential to the OSHA enforcement scheme. While recognizing the exigencies of OSHA inspections designed to protect the health and safety of employees, the Court nevertheless concluded that the requirement of a warrant would not so impede the Government's enforcement efforts as to outweigh the employer's Fourth Amendment right to privacy in his commercial property. Noting that the Secretary's regulations themselves contemplated the possibility of an employer's refusal to permit an inspection, and provided for resort to compulsory process to compel an inspection in such cases, the Court reasoned that the slight delay necessary to obtain a warrant would not significantly reduce the efficiency of the enforcement process.

As the district court in this case recognized, the warrantless entry and inspection procedures authorized by Section 11 of the FLSA are virtually indistinguishable from those held unconstitutional in *Barlow's*. The reasoning of *Barlow's* applies with equal, if not greater, force in the FLSA context. To begin with, Section 11(a) of the FLSA provides a broad warrantless entry and inspection authority similar to that provided by OSHA. Under Section 11(a), the Secretary of Labor is specifically authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate."

Section 11, on its face, purports to provide a warrantless entry and inspection authority as broad as that held unconstitutional in *Barlow's*. The breadth of this authority, and the consequent discretion permitted administrative officers, is borne out by the Government's official policy as set forth in its Field Operations Handbook ("FOH"). Chapter 52, Section 52a00 (b) of the FOH indicates the wide investigative discretion of officers in the field, as it gives these officers the responsibility of developing investigative leads, and of "determining *in advance* which establishments most *need* to be investigated and scheduling these for investigation . . ." (emphasis in original). Chapter 52, Section 52a00 (a) of the FOH further reflects the degree of investigative discretion of Wage and Hour compliance officers when it stresses the necessity of "flexibility to do what makes sense in a given situation, the authority to make judgments as to what is essential to a sound investigation," and the responsibility to weigh various factors to determine "[w]hich establishments shall be investigated."

Thus, the language of FLSA Section 11, as well as the Government's official policy in implementing the investigatory authority provided by that Section, demonstrate clearly that the concerns expressed by this Court in *Barlow's* are fully applicable to FLSA investigations. The Government's inspection system contains the same glaring defect that prompted this Court in *Barlow's* to impose a warrant requirement: it confers "unbridled discretion upon executive and administrative officers particularly those in the field, as to when to search and whom to search." 436 U.S. at 323.

Here, as in *Barlow's*, the Government's argument that its enforcement efforts will be unduly impeded by the requirement of obtaining a warrant, is unfounded. Indeed, as the district court pointed out, there is a less urgent need for immediate on-site inspections in the FLSA context—where the focus of the inspection is on wage and hour records—than in the OSHA setting where immediate inspections may be necessary to protect the health and safety of employees. Under these circumstances, the employer's right to be free from warrantless searches, permitted at any time and without explanation at the discretion of the compliance officer, far outweighs the Government's interest in immediate entry. Based on the facts and the reasoning of *Barlow's*, this Court should uphold the district court's decision that the warrantless inspection provisions of the FLSA are constitutionally impermissible under the Fourth Amendment.

II. The Government's Characterization Of This Case As A "Simple Subpoena Case" Is Misleading And Erroneous.

The Government urges this Court to decide this appeal on the basis of precedent upholding the constitutionality of administrative subpoenas issued to compel

the production of required records without probable cause. Contending that it has not sought entry into Lone Steer's business premises for the purpose of conducting an investigation under FLSA Section 11, the Government argues that the only means used to compel production of these records was the subpoena returnable at the Department of Labor's offices.

However, both the facts and the procedural posture of this case bely the Government's contention that nothing more than the simple subpoena of records is at issue here.[6] As the stipulated facts demonstrate, agents of the Department of Labor sought repeatedly to obtain forced entry into Lone Steer's business premises, over Lone Steer's objection (J.A. 12-15). The Government's efforts to obtain an on-site inspection of records were made in express reliance upon its purported authority to "enter and inspect" under Section 11 of the FLSA (J.A. 14, 23). The Government's continued reliance upon Section 11 to

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6. In its Brief, the Government asserts that "no government official made any attempt to enter appellee's private premises when consent to enter was refused. The only means used to compel production of the documents was the subpoena duces tecum returnable at the Department of Labor's offices." (Brief for the Appellants at 19 n. 11). This contention is erroneous. As the stipulated facts clearly demonstrate, compliance officer Godes twice demanded entry to conduct an inspection at Lone Steer's place of business before referring Lone Steer's objections to Mr. Gilbert (J.A. 12-13). Mr. Gilbert then relied expressly upon Section 11 in his letter to Lone Steer's attorney, in a continued effort to obtain an on-site inspection. Before serving the administrative subpoena, Mr. Godes was instructed to make a final attempt, on February 2, 1982, to conduct an on-site investigation of Lone Steer. Indeed, this final effort was made *after* Lone Steer had filed its action seeking to enjoin the Government's attempts at forced entry. (J.A. 14-15, 1).

attempt to gain entry, notwithstanding this Court's holding in *Barlow's*, was highly improper.

When Lone Steer resisted the Government's demands, the Division responded by a letter expressly asserting its authority to conduct an on-site inspection under FLSA Section 11 and again directed the compliance officer to appear at Lone Steer premises to commence the investigation (J.A. 14, 23).[7] It was only after Lone Steer filed suit challenging the Government's asserted authority to conduct an entry inspection under Section 11 that the Division withdrew its demands and resorted to the use of an administrative subpoena. In fact, the subpoena was not served until after Lone Steer had filed its action in district court challenging the Division's right to implement Section 11's warrantless inspection provisions (J.A. 15, 1).[8]

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7. While it is true that this letter (i.e., Mr. Gilbert's January 20, 1982 letter to Lone Steer attorney Peterson) referred to a potential subpoena request, this subpoena reference was quite vague. The subpoena referred to by Mr. Gilbert was supposed to enable compliance officer Godes to conduct "the investigation," which Gilbert specifically described in his letter as to take place at Lone Steer offices and to involve record review, record transcription, and employee interviews (J.A. 14, 23). There certainly was no effort in this letter to inform the employer that, in light of its objection to an on-site investigation, the Government would readily agree to an off-site review limited to certain documents required by law to be maintained.

8. After the Government filed its subpoena enforcement action in this case, the district court consolidated that action with Lone Steer's earlier filed injunction/declaratory judgment action (J.A. 3-4, 7-8), and judgments in Lone Steer's favor were entered in both civil actions in

Even more significant is the fact that the Government's conduct in this case is entirely consistent with its official policy as set forth in its Field Operations Handbook ("FOH"). As shown by the various portions of the FOH discussed *supra*, the Government has adopted a deliberate, official pattern of conduct involving reliance upon Section 11 to obtain entry into an employer's premises to conduct on-site investigations. Notwithstanding this Court's decision in *Barlow's*, the Department of Labor continues to adhere to its standard operating procedure in implementing the warrantless entry and inspection provisions of FLSA Section 11. This institutionalized procedure, as evidenced by the FOH,

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this case (J.A. 4, 8). When the Government sought this Court's review, it filed separate notices of appeal in *both* actions (J.A. 5, 9). Thus, the issues raised by Lone Steer in its complaint and disposed of by the district court in its opinion are squarely before this Court for decision.

In an appeal brought pursuant to 28 U.S.C. §1252, as is the present appeal, the scope of review by this Court extends to every question in the case, even including matters not addressed by the court below. SEE C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §4037 (1978). *See also U.S. v. Raines*, 362 U.S. 17, 27 n. 7 (1960), in which this Court explained its scope of review under Section 1252 as follows:

> In view of the broad nature of §1252, which seems to indicate a desire of Congress that the whole case come up, . . . we have the power to pass on these other questions, and since the District Court expressed its views on most of them, we also deem it appropriate to do so.

constitutes a deliberate pattern of deprivation of Fourth Amendment rights.[9]

Specifically, when a Wage and Hour official faces employer opposition to a demanded on-site inspection, the official is directed, by Chapters 52 and 86, Sections 52a05 (a) and 86b00 (a) of the OFH, to specifically direct the employer's attention to the warrantless entry and inspection provisions of FLSA Section 11(a).[10] If the employer persists in refusing to permit the demanded entry,

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9. As discussed more fully below, the Division's standard operating procedure includes express reliance upon Section 11's authority to counter any employer resistance to such inspections. This continuing official policy reinforces the conclusion that Lone Steer's request for declaratory relief was, and is, a live issue in need of decision. As this Court explained in *U.S. v. W. T. Grant Co.*, 345 U.S. 629 (1953), a defendant who has discontinued challenged activities can convince the Court that the controversy is no longer ripe for decision only if he satisfies the heavy burden of showing there is no reasonable expectation that the wrong will be repeated. *See also U.S. v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) ("when defendants are shown to have settled into a continuing practice [of unlawful conduct] . . . , courts will not assume that it has been abandoned without clear proof . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.") In the present case, just such a probability of resumption is demonstrated by Appellants' continuing policy of reliance upon Section 11's authority to enforce on-site inspections over the objections of reluctant employers. In light of this Court's decision in *Barlow's*, the Government's adherence to such an investigation system should not be permitted to continue.

10. *See* provisions of FOH Chapters 52 and 86, Sections 52a05(a) and 86b00(a), *supra* at page 6.

the compliance officer's superior again is directed by published Governmental policy, to request the employer to reconsider his refusal, and to remind him of the Government's purported authority to conduct on-site inspections pursuant to FLSA Section 11. This precise policy was followed in the present case (J.A. 14, 23).

Thus, not only has the Government adopted an official policy of regular reliance upon the warrantless inspection provisions of FLSA Section 11 to obtain entry into business premises, but also—as its standard procedure—it has made a practice of specifically directing employers to that Section when any resistance is encountered. This regular course of conduct, in light of the clear applicability of this Court's holding in *Barlow's* to the warrantless inspection provisions of the FLSA, is an institutionalized deprivation of Fourth Amendment rights. Such a policy should not be permitted to continue.

III. The Government's Investigation Technique Of Responding To Employer Resistance To On-Site Investigations By Directing The Employer To FLSA Section 11 Is Misleading And Calculated To Obtained A Coerced Consent To Such Investigations.

As Chapters 52 and 86, Sections 52a05 (a) and 86b00(a) and (c) of the Field Operations Handbook indicate, a deliberate pattern of reliance upon Section 11 has been established by the Government. This pattern, already improper in light of *Barlow's*, is compounded by the Government's misleading references to Section 11 in an effort to persuade reluctant employers to permit entry. Each and every time a compliance officer encounters employer resistance to his demand for entry, he is instructed by these Sections of the FOH to counter that resistance by directing the employer's attention to the

Government's purported authority to obtain entry under Section 11. This practice is misleading to the employer, who is usually a layman, and is calculated to obtain "consent" to conduct an entry inspection under color of purported statutory authority to do so.

This Court has made it quite clear that acquiescence to a false or invalid claim of authority to conduct a search does not constitute genuine consent under the Fourth Amendment. The leading case in this area is *Bumper v. North Carolina*, 391 U.S. 543 (1968), in which police officers obtained "consent" to search after asserting that they possessed a valid warrant. This Court held that no valid consent had been obtained, because the officers were admitted only after asserting that they had lawful authority to enter. According to the Court, the burden of proving voluntary consent to a search

> cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. . . . When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

391 U.S. at 548-50.

Recognizing that a law enforcement official may exercise this type of improper coercion in a variety of ways, the Court of Appeals for the District of Columbia Circuit has applied the reasoning of *Bumper* to invalidate a seizure of records obtained under threat of a statutory penalty. In *Jones v. Unknown Agents of Federal Election*

Commission, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied* 444 U.S. 1074 (1980), a law enforcement official obtained "consent" to inspect plaintiff's financial records by informing him that he would incur criminal penalties if he refused to produce the documents. The court held that the plaintiff's "consent" was coerced and therefore invalid because the agent's threat of statutory sanctions was, in effect, an announcement that the plaintiff had no right to resist the seizure of the documents in question.

Although the Government in the present case has not attempted to obtain entry by asserting the existence of a valid warrant or by threat of penalty, its institutionalized policy of express reliance upon FLSA Section 11 is no less coercive. The reasoning of *Bumper* should be applied with equal force to the practice of obtaining "consent" based upon invalid statutory authority to enter and inspect. A police officer with a purportedly valid search warrant clearly wields a high degree of colorably lawful coercion. However, any layman specifically directed to the language contained in Section 11 of the FLSA also would obtain a clear message that he had no right to resist the on-site investigation. At the least, this official conduct is highly misleading to the employer, and is calculated to obtain an imperfect "consent" to an on-site inspection in deprivation of the employer's constitutional rights.

In sum, the Government's conduct of brandishing, in the face of employer objection, unconstitutional statutory authority in order to achieve consent to a search, not otherwise permissible without a warrant, should not be permitted to continue.

CONCLUSION

For these reasons, this Court should affirm the judgments of the district court and its underlying holding that the warrantless entry and inspection provisions of the FLSA Section 11 violate the Fourth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT W. HARTLAND
LARAINE R. ALLEN

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

(412) 288-3131

Counsel for *Amicus Curiae*
National Restaurant Association

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No. 82-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants,

v.

LONE STEER, INC.,
Appellee.

On Appeal from the United States District Court for the District of North Dakota

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLEE

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
NICHOLAS E. CALIO
MICHAEL P. McDONALD
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
Washington Legal Foundation

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QUESTION PRESENTED

Whether the Secretary of Labor (through his agents) may enter upon the premises of a business establishment and proceed with an unlimited-in-scope inspection of the records of that business pursuant to Section 11(a) of the Fair Labor Standards Act (29 U.S.C. § 211) without having first obtained a judicially issued search warrant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Fourth Amendment Was Intended to Protect Businesses Against Warrantless Searches	6
II. This Court's Decision in *Marshall v. Barlow's, Inc.* Is Fully Dispositive of the Instant Case	10
III. Public Interest Considerations Dictate That This Court Reaffirm *Barlow's* by Holding That the Proposed On-the-Premises Search of Lone Steer's Business Records Is Unconstitutional Absent a Judicially Ordered Warrant	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Camara v. Municipal Court, 387 U.S. 523 (1967).. 5, 8, 9, 15
Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) 9
Frank v. Maryland, 359 U.S. 360 (1959) 8
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 7
Johnson v. United States, 333 U.S. 10 (1948)..... 15
Katz v. United States, 389 U.S. 347 (1967) 9
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).....*passim*
See v. City of Seattle, 387 U.S. 541 (1967) 8, 9, 13, 14
United States v. Biswell, 406 U.S. 311 (1972)..... 9
United States v. Chadwick, 433 U.S. 1 (1977)..... 7, 15
Warden v. Hayden, 387 U.S. 294 (1967) 7

Constitutional and Statutory Provisions:

U.S. CONST., fourth amendment .....*passim*
Fair Labor Standards Act of 1938, Section 11(a), 29 U.S.C. § 221(a) 4, 12, 13
Occupational Safety and Health Act of 1970, Section 8(a), 29 U.S.C. § 657(a) 5, 6, 10

Miscellaneous:

Mauro, *Government vs. Privacy*, Nation's Business, September 1983 14
Note, *Marshall v. Barlow's Inc.: Are Employer's Fourth Amendment Rights Protected?* 16 Case W. L. Rev. 161 (1980) 7

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLEE

INTERESTS OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulation, judicial procedure, and constitutional law involving the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. *See, e.g., Moody v. State of Alabama, ex rel. Tharpe Forrester*, No. 82-740 (U.S. filed Oct. 28, 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. Feb. 22, 1983); *General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141 (1982); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the general public by urging the Court to affirm the decision of the United States District Court for the District of North Dakota. The district court correctly held that the Secretary of Labor may not proceed to enter upon a business' premises for the purpose of inspecting its records under Section 11(a) of the Fair Labor Standards Act without first having obtained a valid search warrant. This holding is consistent with the history of the fourth amendment. Moreover, it accords with recent past decisions of this Court which have stressed that warrantless administrative searches constitute an unreasonable intrusion upon the fourth amendment rights of businessmen.

The present parties to this controversy are primarily concerned with the legality of the Secretary of Labor's actions insofar as they concern the activities of Lone Steer, Inc. For this reason, the larger public interest issues may not receive the full consideration they de-

serve. The participation of the Washington Legal Foundation will assist this Court in better understanding these issues and in reaching the result that will best serve the public interest.

Both parties have consented to the filing of this *amicus curiae* brief in papers which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the Statement contained in the Brief for the Appellants at 4-10. However, in order for the constitutional issues presented by this case to be viewed in their proper context, *amicus* wishes to stress the following.

The instant controversy originated on January 6, 1982 when a compliance officer with the Wage and Hour Division of the United States Department of Labor (appellants) telephoned Lone Steer, Inc. (appellee) and informed its manager that an unexpected, and unlimited-in-scope investigation of Lone Steer's business records would commence at 9:00 a.m. the following morning (J.S. at 2a). Lone Steer refused to consent to the proposed investigation and appellants subsequently sought to have the investigation rescheduled a week later on January 14, 1982. Following an exchange of correspondence and telephone calls, counsel for the appellee attempted to discover the reasons for the administrative investigation of his client's business records and what its precise scope would be. Consent to conduct an on-the-premises search was withheld pending appellants' response to this inquiry.

Several days later, on January 20, 1982, the Assistant Regional Administrator for the Wage and Hour Division of the Department of Labor notified Lone Steer by letter that the underlying motive for the investigation would not be given. The letter also refused to disclose the precise scope the proposed administrative investigation would

take. For these reasons, Lone Steer continued to refuse to allow the Administrator's agents to enter upon its premises to conduct the required search of its business records. Subsequently, however, on February 2, 1982, government agents did enter appellee's premises under instructions to carry out the proposed unlimited-in-scope administrative investigation. However, since Lone Steer's manager was unavailable to assist in the search, the agents instead served a Lone Steer employee with an administrative subpoena duces tecum requesting the production of certain records and then left the premises.*

In response to the abortive investigation, appellee's attorney commenced this action against appellants in the United States District Court for the District of North Dakota. The complaint alleged, *inter alia*, that "[t]he Defendants' investigation pursuant to Section 11 and 9 of the Fair Labor Standards Act (29 U.S.C. § 211) constitutes and [sic] unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution." The Secretary of Labor subsequently petitioned the district court to compel appellee to comply with the administrative subpoena whereupon the district court consolidated the two actions.

On October 27, 1982 the district court granted summary judgment in favor of the appellee holding that "the Secretary of Labor may not proceed [through his agents] to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the

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* The "limited" subpoena demonstrates how unlimited the proposed on-the-premises search would have been since it requires Lone Steer to produce "[r]ecords showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; [and] (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies." (J.A. at 26.) *Amicus* is puzzled as to what possible relevance the production of all these documents has to the Secretary's investigation of whether Lone Steer is complying with the Fair Labor Standards Act of 1938.

Fair Labor Standards Act without first having obtained a valid warrant" (J.S. at 8a). The Court's judgment was premised upon this Court's ruling in the case of *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which held that a warrantless inspection of business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 violated the fourth amendment.

SUMMARY OF ARGUMENT

The district court's ruling that the Secretary of Labor may not proceed to enter upon premises of a business for the purpose of inspecting its records under Section 11(a) of the Fair Labor Standards Act without first having obtained a valid warrant is consistent with the rights afforded businesses under the fourth amendment to the Constitution and with recent past decisions of this Court.

The fourth amendment prohibits all unreasonable searches that are not accompanied by a warrant. Historically, the framers of the amendment intended employers to be a class protected by its provisions. Moreover, in a line of recent cases beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court has strongly reemphasized that commercial offices enjoy nearly the same fourth amendment protections from unreasonable searches as private dwellings. Because the proposed on-the-premises unlimited-in-scope administrative inspection of Lone Steer's business records constituted a significant intrusion into its business affairs, Lone Steer's privacy rights under the fourth amendment were clearly implicated and a judicially-ordered search warrant was necessary if the proposed investigation was to proceed.

This conclusion is reinforced by this Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In *Barlow's*, a case whose facts are substantially similar to those *sub judice*, the Court held that the Secretary of Labor must obtain a search warrant prior to conducting

an inspection of a business establishment pursuant to § 8(a) of the Occupational Safety and Health Act. A principal concern of this Court in *Barlow's* was to protect business employers against unreasonable governmental intrusion by having a neutral and detached magistrate closely scrutinize administrative inspection programs. Despite the fact that the search in *Barlow's* was conducted in order to protect the health and safety of employees, this Court found that a warrant was necessary. *A fortiori*, a warrant is required here where entry is sought merely for the purposes of determining compliance with wage and hour regulations. Accordingly, the reasoning of the *Barlow's* Court is fully applicable and dispositive of the present controversy.

ARGUMENT

I. The Fourth Amendment Was Intended to Protect Businesses Against Warrantless Searches.

This Court has long recognized that history sheds much light upon the meaning and scope of the various protections embodied in the Constitution. This is particularly true in the context of the fourth amendment which provides a rich historical background rooted in the American colonial experience.

The fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While *amicus* has no intention of reviewing the history of this amendment in detail, it is important to emphasize that it was designed with two purposes in mind. "[A] reaction to the evils of the use of the general warrant in

England and the writs of assistance in the colonies, . . . [it] was intended to protect against invasions of 'The sanctity of a man's home and the privacies of life.'" *Warden v. Hayden*, 387 U.S. 294, 301 (1967). Equally important, however, is the historical fact that the fourth amendment was intended to afford a fundamental right to employers to be left free from intrusive and unreasonable searches of their business premises by overzealous government agents.

> This amendment is the one procedural safeguard in the United States Constitution that grew out of the virtually unrestrained and judicially unsupervised searches immediately preceding the revolutionary struggle with England. The writs of assistance issued by the Crown to search warehouses, stores and homes for smuggled goods were considered extremely obnoxious by the Colonists. Historically, employers were thought to be a class protected by the fourth amendment.

Note, *Marshall v. Barlow's, Inc.: Are Employer's Fourth Amendment Rights Protected?* 16 Case W.L. Rev. 161, 163 (1980) (footnotes omitted). *See also United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) (". . . it cannot be doubted that the Fourth Amendment's commands grew in large measure out of the Colonists' experience with the writs of assistance . . . [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.") It is clear therefore that the ban on warrantless searches contained in the fourth amendment was intended by its Framers to shield places of business as well as private dwellings. Thus in the criminal context, this Court has repeatedly refused to sanction unreasonable warrantless searches that were directed at commercial rather than residential premises. *See, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

With the growth of federal regulatory agencies, this Court was forced to consider whether warrantless searches

conducted pursuant to administrative inspection programs infringed upon the rights afforded employers under the fourth amendment. Initially, a divided Court reasoned that the interests of the businessman in this instance were not protected by the fourth amendment but were merely on the "periphery" of the interests protected by the Constitution. *Frank v. Maryland*, 359 U.S. 360, 367 (1959). Subsequent decisions, however, have repudiated this ahistorical reading of the fourth amendment and have strongly reaffirmed that the fourth amendment rights of employers are not merely "peripheral" but are fully protected under that provision.

For example, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), a municipal health inspector sought entry into a citizen's dwelling in order to conduct an inspection for health code violations pursuant to an administrative inspection plan. This Court, however, found that the inspection contravened the fourth amendment holding that a warrant was required in the administrative inspection context. "[E]xcept in certain carefully defined classes of cases a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528-529. Supporting the conclusion reached by the Court in *Camara* were findings that unless a warrant was required in the administrative inspection context, officers in the field would have unbridled discretion to search private property as they pleased. *Id.* at 531.

The conclusions drawn in *Camara* were reinforced in *See v. City of Seattle*, 387 U.S. 541 (1967). *See* was the companion case to *Camara* and it held that the protections against warrantless administrative searches afforded the owners or occupiers of private dwellings applied to business establishments as well. Its reasoning is worth quoting at length:

> As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted

> without a warrant. *The businessman*, like the occupant of a residence, *has a constitutional right to go about his business free from unreasonable official entries upon his commercial property.* The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. Seattle, 387 U.S. 541, 543 (1967) (emphasis added).

Decisions subsequent to *Camara* and *See* have established a limited number of exceptions to the warrant requirement in the administrative inspection context. *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

The gravamen of these two decisions is that certain industries have such a history of government oversight that no reasonable expectation of privacy, *see Katz v. United States*, 389 U.S. 347 (1967), exists. Liquor (*Colonade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations.

Industries such as these fall within the "certain carefully defined classes of cases," referred to in *Camara*. 387 U.S. at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. This Court has emphasized, moreover, that the *Colonade* and *Biswell* decisions are "exceptions" and "responses to relatively unique circumstances." *Marshall v. Barlow's*, 436 U.S. 307, 313 (1978).

In sum, the history of the fourth amendment and subsequent fourth amendment jurisprudence as articulated

by this Court demonstrate that except in exceptional circumstances business premises are protected against warrantless searches conducted pursuant to an otherwise valid administrative inspection scheme.

II. This Court's Decision in *Marshall v. Barlow's, Inc.* Is Fully Dispositive of the Instant Case.

The lines of cases beginning with *Camara* and *See* established the principle that, except in the case of a pervasively regulated industry, a government administrative agent must obtain a search warrant based upon probable cause before entry upon an employer's premises to perform an administrative inspection will be constitutionally permissible under the fourth amendment. In *Marshall v. Barlow's, Inc.*, a case whose facts strongly resemble those *sub judice*, this Court was called upon to decide whether the warrantless search provisions of section 8(a) of the Occupational Safety and Health Act of 1978, 29 U.S.C. § 657(a), were repugnant to the fourth amendment. Section 8(a) authorized agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations without a warrant.

The controversy in *Barlow's* arose when an OSHA compliance officer sought to conduct a search of the working areas of Barlow's Incorporated, an electrical and plumbing installation business. When asked by company president, Mr. Barlow, if there had been any complaint by an employee, the compliance officer answered no. The president then informed the compliance officer that an inspection could not be made without a warrant, stating that he was relying upon his rights as guaranteed by the fourth amendment.

Three months later the Secretary of Labor petitioned the federal district court for the district of Idaho to issue an order compelling Mr. Barlow to admit the inspector.

The requested order was issued and presented to Mr. Barlow who again refused entry and sought injunctive relief against the warrantless searches provided for under the Act. A three-judge court convened and ruled in Mr. Barlow's favor enjoining enforcement of section 8(a) of the Act. This Court then noted probable jurisdiction, reviewed the case and affirmed the Idaho district court decision. *Barlow's*, 436 U.S. at 309-310.

In reaching its decision, the Court first focused upon the private property interests of businessmen protected from warrantless government intrusions. *Id.* at 311. It reviewed the history of the fourth amendment and found that these interests suffered whether the intrusions by the government were performed in order to investigate alleged violations of the criminal laws or breaches of regulatory standards. *Id.* at 311-312. Consequently, the Court concluded that unless some recognized exception to the fourth amendment's warrant requirement applied, the OSHA compliance officer would need to obtain a warrant to conduct the planned inspection of Mr. Barlow's business premises. "[U]nless some recognized exception to the warrant requirement applies, *See v. Seattle* would require a warrant to conduct the inspection. . . ." *Id.* at 313.

In response, the Secretary of Labor advanced three arguments: (1) that the industry in question was pervasively regulated; (2) that the employer had no "reasonable expectation of privacy"; and (3) that requiring a warrant would cripple the effectiveness of the Act. The Court rejected all three arguments as untenable. First, the Court found no implied consent to a warrantless search under the *Colonade-Biswell* exception. *Id.* at 313-315. Second, the Court found that the employer had a reasonable expectation of privacy and that a warrant would be necessary not only to require a neutral officer's review of the administrative plan but to apprise the employer of the scope and object of the inspection. *Id.* at 322-324. To quote directly from the opinion:

> Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable. . . . [It would] [a]lso . . . advise the owner of the scope and objectives of the search, beyond which the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

Id. (footnotes omitted).

Finally, the Court rejected the argument that the effectiveness of the Act would be crippled: "[T]he Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse, while the inspector obtains the necessary process." *Id.* at 318.

The Court's reasoning in *Barlow's* is equally applicable to the facts of this case. Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 211(a), similar to the sweeping inspection language contained in section 8(a) of the OSHA, gives the Secretary of Labor and his agents in the field, broad unbridled discretion ". . . to investigate and gather data regarding the wages, hours, and other conditions of employment" and ". . . to enter and inspect such places and records . . . as he may deem necessary. . . ." No warrant is required to be obtained prior to the search.

Pursuant to Section 11(a) the Secretary, acting through his agents, attempted to enter the premises of Lone Steer

to conduct an unlimited-in-scope inspection of its business records in order to determine if this business was acting in compliance with the Act. However, as in *Barlow's*, the Secretary was repeatedly refused entry onto the premises until such time as he obtained a judicially issued warrant that would delineate the precise scope of the search. The Secretary is now seeking to have this Court retreat from its holding in *Barlow's* by overturning the district court ruling that a warrant is necessary in these circumstances. Yet *Barlow's* is so dispositive of this controversy that such a position is entirely untenable.

First, it cannot be doubted that the warrantless administrative search procedure authorized under section 11(a) of the FLSA implicates the fourth amendment constitutional right of a businessman to be free from nonconsensual official entry onto his private property. *Cf.*, *See v. City of Seattle*, 387 U.S. at 545 (". . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure").

Second, the proposed inspection does not fall within the purview of the *Colonade-Biswell* exception to the warrant requirement. Government oversight of wages and hours simply does not approximate the pervasiveness of regulations upon which a finding of implied consent could be made. *See*, *Marshall v. Barlow's, Inc.*, 436 U.S. at 314 (finding unconvincing the suggestion that implied consent to warrantless searches could be found through the Walsh-Healey Act's provision relating to the "imposition of minimum wages and maximum hours on employers").

Finally, it is clear that the FSLA would not be frustrated by requiring a warrant for a surprise on-the-premises search of an employer's wage and hour records. Other means exist to insure compliance with the Act's provisions such as the use of an administrative subpoena

duces tecum. The Secretary concedes as much in that in his Motion to Alter or Amend Judgment he did not contest the district court's order prohibiting him from entering upon Lone Steer's premises to conduct a warrantless search. Instead, the Secretary simply sought to have a paragraph added to the Order that would require the administrative subpoena duces tecum to be enforced. *See* J.S. at 16a.

III. Public Interest Considerations Dictate That This Court Reaffirm *Barlow's* by Holding That the Proposed On-the-Premises Search of Lone Steer's Business Records Is Unconstitutional Absent a Judicially Ordered Warrant.

Over fifteen years ago in *See v. City of Seattle*, Justice White accurately took notice of the fact that:

> As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws . . . .

387 U.S. at 543-44. Today the governmental regulation of business enterprise has increased even more. With this increase in regulatory supervision has come increased interference and harassment of small businessmen by government regulatory agencies. For example, it has been reported that in 1982 alone, the Department of Labor conducted close to 74,000 investigations of business wage and hour records under the Fair Labor Standards Act similar to the investigation it sought to carry out against Lone Steer. Mauro, *Government vs. Business Privacy*, Nation's Business, September 1983, at 64.

The increasing tendency of government bureaucrats to interfere with the working of small businesses like Lone

Steer conflicts with the "basic purpose" of the fourth amendment which "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528.

As already demonstrated, the warrant clause of the Fourth Amendment protects commercial dwellings as well as private homes. *Marshall v. Barlow's, Inc.*, 436 U.S. at 312. The purpose behind the warrant requirement is to insure that the judgment of a neutral and detached magistrate is imposed against the unbridled discretion of an official caught up in the heat of an investigation. *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Small businessmen across the country would see their fourth amendment rights eviscerated if the Court were to renege on its holding in *Barlow's*. To allow government agents to conduct unlimited-in-scope searches of business records is an open invitation to abuse of power. Only by requiring administrative inspectors to obtain a judicially issued warrant can there be any protection against this erosion of the rights of businessmen.

CONCLUSION

For all of the foregoing reasons, the Washington Legal Foundation submits that this Court should affirm the district court.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
NICHOLAS E. CALIO
MICHAEL P. MCDONALD
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
Washington Legal Foundation

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v.
Lone Steer, Inc.

Court: United States District Court for the District of North Dakota

Counsel for appellant: Solicitor General

Counsel for appellee: Peterson, Richard G.

Entry	Date	Note	Proceedings and Orders
1	Feb 4 1983		Application for extension of time to docket appeal and order granting same until April 14, 1983 (Blackmun, February 4, 1983).
2	Apr 14 1983	G	Statement as to jurisdiction filed.
3	May 16 1983		Motion of appellee to dismiss or affirm filed.
4	May 18 1983		DISTRIBUTED. June 2, 1983
5	Jun 6 1983		PROBABLE JURISDICTION NOTED.
			**********
7	Jul 21 1983		Order extending time to file brief of appellant on the merits until August 20, 1983.
8	Aug 5 1983		Joint appendix filed.
9	Aug 12 1983		Record filed.
10	Aug 17 1983		Brief of appellants Raymond J. Donovan, et al. filed.
11	Sep 16 1983		Brief amicus curiae of Washington Legal Foundation filed.
12	Sep 19 1983		Brief amicus curiae of Equal Empl. Advisory Council filed.
13	Sep 21 1983		Brief amicus curiae of Natl. Restaurant Assn. filed.
14	Sep 26 1983		Brief of appellee Lone Steer, Inc. filed.
15	Oct 14 1983		CIRCULATED.
16	Oct 24 1983		SET FOR ARGUMENT. Tuesday, November 29, 1983. (4th case) (1 hour)
17	Nov 22 1983	X	Reply brief of appellant Donovan, Sec. of Labor filed.
18	Nov 29 1983		ARGUED.